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Jared R. Friedmann  
Jacqueline Marcus  
Jennifer Brooks Crozier

*Attorneys for Debtors  
and Debtors in Possession*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X	
	:
<b>In re</b>	:
	:
<b>SEARS HOLDINGS CORPORATION, et al.,</b>	:
	:
<b>Debtors.<sup>1</sup></b>	:
	:
-----X	

**Chapter 11**  
**Case No. 18-23538 (RDD)**  
**(Jointly Administered)**

**DECLARATION OF JENNIFER BROOKS CROZIER IN SUPPORT OF  
DEBTORS' MOTION TO COMPEL TURNOVER OF ESTATE PROPERTY**

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); SR – Rover de Puerto Rico, LLC (f/k/a Sears, Roebuck de Puerto Rico, Inc.) (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Rover Brands Business Unit, LLC (f/k/a Sears Brands Business Unit Corporation) (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors' corporate headquarters is 130 W. 44nd St., 17th Fl., New York, NY 10036.

Pursuant to 28 U.S.C. § 1746, I, Jennifer Brooks Crozier, hereby declare and state as follows:

1. I am an Associate at Weil, Gotshal & Manges LLP (“**Weil**”) and counsel for the Debtors in the above-captioned proceeding.

2. I submit this Declaration in support of the Motion of Debtors to Compel Turnover of Estate Property filed concurrently herewith.

3. Attached hereto as **Exhibit A** is a true and correct copy of a letter dated May 20, 2020 from L. Barefoot of Cleary Gottlieb Steen & Hamilton LLP (“**Cleary**”) to J. Friedmann, et al. of Weil Re: *In re Sears Holdings Corp. et al.*, Case No. 18-023538 (RDD), with redactions to protect highly confidential and sensitive commercial information.

4. Attached hereto as **Exhibit B** is a true and correct copy of an email chain dated from May 20, 2020 to November 5, 2020 between and among S. O’Neal, et al., of Cleary and J. Crozier, et al., of Weil Re: *In re Sears Holdings Corp.*, No. 18-25358 (Bankr. S.D.N.Y.).

5. Attached hereto as **Exhibit C** is a true and correct copy of an email chain dated from November 6, 2020 to November 10, 2020 between and among S. Levander, et al., of Cleary and J. Crozier, et al., of Weil Re: *Sears – Litigation and Insurance Claims/Closed Claims*.

6. Attached hereto as **Exhibit D** is a true and correct copy of excerpts of the transcript of the December 13, 2019 hearing before the Honorable Robert D. Drain, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of New York, in connection with the above-captioned chapter 11 cases [Docket No. 6244].

7. Attached hereto as **Exhibit E** is a chart that reflects the amounts Transform has advised through counsel (in Exhibit A attached hereto) were [recovered] from the Closed Claims that acknowledged and agreed belong to the Debtors as set forth in Schedule 1 of the Second APA

Settlement Agreement. The chart reflects that, according to Transform, the aggregate amount of the Debtors' Closed Claims totals \$676,688.73.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 20, 2020  
New York, New York

/s/ Jennifer Brooks Crozier

Exhibit A

## CLEARY GOTTlieb STEEN &amp; HAMILTON LLP

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New York, NY 10006-1470

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STEVEN M. LCEE	DUANE MCLAUGHLIN	KATHERINE R. REAVES
CRAIG E. BROD	BREON S. PEACE	RAHUL MUKHI
NICOLAS GRABAR	CHANTALE E. KORDULA	ELANA S. BRONSON
CHRISTOPHER E. AUSTIN	BENET J. O'REILLY	MANUEL SILVA
HOWARD S. ZELBO	ADAME FLEISHER	KYLE A. HARRIS
DAVID E. BRODSKY	SEAN A. O'NEAL	LINA BENSMAN
ARTHUR H. KOHN	GLENN P. MCGRORY	ARON M. ZUCKERMAN
RICHARD J. COOPER	MATTHEW P. SALERNO	RESIDENT PARTNER
JEFFREYS. LEWIS	MICHAEL J. ALBANO	
PAUL J. SHIM	VICTOR L. HOU	SANDRA M. ROCKS
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ANDRES DE LA CRUZ	AMY R. SHAPIRO	PENELOPEL CHRISTOPHOU
DAVID C. LOPEZ	JENNIFER KENNEDY PARK	BOAZ S. MORAG
MICHAEL A. GERSTENZANG	ELIZABETH LENAS	MARY E. ALCOCK
LEV L. DASSIN	LUKE A. BAREFOOT	HEIDE H. JLGENFRITZ
NEIL Q. WHORISKEY	JONATHAN S. KOLODNER	KATHLEEN M. EMBERGER
JORGE U. JUANTORENA	DANIEL ILAN	AVRAM E. LUFT
MICHAEL D. WEINBERGER	MEYER H. FEDIDA	ANDREW WEAVER
DAVID LEINWAND	ADRIAN R. LEIPSIC	HELENA K. GRANNIS
DIANA L. WOLLMAN	ELIZABETH VICENS	JOHN V. HARRISON
JEFFREY A. ROSENTHAL	ADAM J. BRENNEMAN	CAROLINE F. HAYDAY
MICHAEL D. DAYAN	ARI D. MACKINNON	NEIL R. MARKEL
CARMINE D. BOCCUZZI, JR.	JAMES E. LANGSTON	KENNETH S. BLAZEJEWSKI
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KIMBERLY BROWN BLACKLOW	COLIN D. LLOYD	SHIRLEY M. LO
ROBERT J. RAYMOND	COREY M. GOODMAN	JONATHAN D.W. GIFFORD
SUNG K. KANG	RISHI ZUTSHI	SUSANNA E. PARKER
SANDRA L. FLOW	JANE VANLARE	DAVID W.S. YUDIN
FRANCISCO L. CESTERO	DAVID H. HERRINGTON	RESIDENT COUNSEL
FRANCESCA L. ODELL	KIMBERLY R. SPOERRI	
WILLIAM L. MCRAE	AARON J. MEYERS	LOUISE M. PARENT
JASON FACTOR	DANIEL C. REYNOLDS	OF COUNSEL
JOON H. KIM	ABENA A. MAINOO	

SUBJECT TO F.R.E. 408 – CONFIDENTIAL SETTLEMENT MATERIALS

May 20, 2020

VIA EMAIL

Jared R. Friedmann  
Weil, Gotshal & Manges  
767 Fifth Avenue  
New York, NY 10153

Re: In re Sears Holdings Corp. et al. Case No. 18-23538 (RDD)

Dear Jared,

As you are aware, Transform's property claims department has been managing a number of affirmative litigation and insurance claims related to certain properties, some of which have been the subject of ongoing correspondence between Transform and M-III.<sup>1</sup> At your request, we have enclosed schedules of all such claims below. Appendix A reflects claims that have been resolved; Appendix B reflects claims that are still pending.

As described below, Debtors are entitled to ten closed claims listed in Appendix A for a total recovery of \$614,018.94, and fifteen pending claims listed in Appendix B, based upon currently available information and based on Transform's experience and judgment, that Transform's property claims department estimate will yield total recovery of \$509,979.00. Transform is prepared to transfer these claims, or the proceeds thereof, to the Debtors, subject to overall agreement on the outstanding APA disputes that we have been discussing.<sup>2</sup>

<sup>1</sup> Terms not defined herein shall have the definition ascribed to them in the Asset Purchase Agreement, dated as of January 17, 2019, by and among Sears, each of Sears' subsidiaries party thereto, and Transform (as may be amended, restated, supplemented or modified from time to time, the "APA").

<sup>2</sup> Any and all information provided herein concerning estimated recoveries is provided for informational purposes only and is based on a series of assumptions about risk that may change as litigation progresses. The

Jared R. Friedmann, p. 2

Transform is entitled to the remainder of these claims, which, as further detailed in the appendices below, relate to one or more of the following general categories:<sup>3</sup>

- **Operating Owned Properties:** The Operating Owned Properties listed in Schedule 1.1(p) to the APA are defined as Acquired Assets in section 2.1(c) of the APA and defined in the Recitals to the APA as part of Seller's "Business." In turn, any claims related to these properties are Acquired Assets under APA section 2.1(p) as "Actions or Claims . . . of Sellers as of the Closing that (i) constitute Acquired Assets under any other subsection of this Section 2.1, or (ii) are against vendors, counterparties to leases, licenses or other contracts, customers, Transferred Employees or parties to other commercial relationships of the Business, in each case as of immediately prior to the Closing, that arose in connection with the ownership of the Acquired Assets or the operation of the Business or the Acquired Assets, excluding (in each case) any Actions or Claims that are, or are Related to, an Excluded Asset or Excluded Liability."

These claims are also Acquired Assets under APA section 2.1(q) as "any and all insurance proceeds, warranty proceeds, condemnation award or other compensation in respect of loss or damage to the Business . . . to the extent relating to a casualty occurring prior to, on or after the date hereof . . . ." Several of these claims fall within the category of "insurance proceeds," but importantly this section of the APA extends further to "other compensation," regardless of the source of such compensation. All of these claims meet the definition of "other compensation."

- **Sparrow Properties:** The Sparrow Properties listed in Schedule 1.1(q) to the APA are defined as Acquired Assets in section 2.1(s) of the APA, and any claims related to these properties are Acquired Assets under APA section 2.1(p), as described above.
- **Operating Leases:** The Operating Leases listed in Schedule 1.1(o) to the APA are defined in the Recitals to the APA as part of Seller's "Business," and any claims related to the Operating Leases (whether ultimately rejected or designated for assumption or assignment) are therefore Acquired Assets under APA section 2.1(q).

All Operating Leases that were designated for assumption and assignment are defined as Acquired Assets pursuant to section 2.1(b) of the APA. Any claims related to assumed Operating Leases are therefore also Acquired Assets under APA section 2.1(p).

- **Assumed Contracts:** Any contracts designated for assumption and assignment are defined as Acquired Assets pursuant to section 2.1(a) of the APA. Any claims related to assumed contracts are therefore Acquired Assets under APA section 2.1(p).

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Debtors should not rely on any representation as to the actual likelihood of success of any pending claim, and nothing herein should be construed to constitute a guarantee of recovery.

<sup>3</sup> The analysis in this letter does not cover claims related to Sears Hometown and Outlet Stores, Inc. properties, as the Debtors did not own these properties at Closing, and an affiliate of Transform's acquired an interest in these properties when that affiliate acquired Sears Hometown and Outlet Stores, Inc. in October 2019. The Debtors therefore have no claim to any recoveries related to any Sears Hometown and Outlet properties.

Jared R. Friedmann, p. 3

- **Properties Subject to the New Seritage Master Lease:** Transform and Seritage entered into a new Master Lease on March 12, 2019 (the “Transform Master Lease”). Transform therefore has sole claim to any recoveries related to properties subject to the Transform Master Lease where the date of loss occurred after March 12, 2019.

Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/ Luke A. Barefoot

Luke A. Barefoot

## Debtors

## Transform

<sup>5</sup> Deposited in a client trust account with Thompson Brody & Kaplan, LLP.



[illegible]

Jared R. Friedmann, p. 6

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
2911 Bayamon	\$717.29	2/8/2018	Schedule 1.1(o) – Operating Leases – Rejected
3424 Gainesville	\$2,392.50	12/7/2018	Schedule 1.1(o) – Operating Leases – Rejected
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
4026 St Joseph	\$40,790.00	1/11/2018	Schedule 1.1(o) – Operating Leases – Rejected
1300 Oak Brook	\$18,750.00	1/21/2019	Schedule 1.1(o) – Operating Leases – Rejected
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]		

## Debtors

## Transform

<sup>6</sup> Pending settlement offer.

[illegible]

[illegible]

Exhibit B

**From:** [O'Neal, Sean A.](#)  
**To:** [Crozier, Jennifer Brooks](#); [Levander, Samuel](#); [Friedmann, Jared](#); [Marcus, Jacqueline](#)  
**Cc:** [Barefoot, Luke A.](#); [Allen, Charles W.](#); [Kim, Hoori](#)  
**Subject:** RE: In re Sears Holdings Corp., No. 18-25358 (Bankr. S.D.N.Y.)  
**Date:** Thursday, November 5, 2020 11:49:56 AM

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Jennifer, before seeing this email, I had reached out to Jared to discuss. Don't think we need a big group call, but let us know when you want to discuss.

Sean

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**Sean A. O'Neal**

Cleary Gottlieb Steen & Hamilton LLP  
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One Liberty Plaza, New York NY 10006  
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**From:** Crozier, Jennifer Brooks <[Jennifer.Crozier@weil.com](mailto:Jennifer.Crozier@weil.com)>  
**Sent:** Thursday, November 5, 2020 11:30 AM  
**To:** Levander, Samuel <[slevander@cgsh.com](mailto:slevander@cgsh.com)>; Friedmann, Jared <[Jared.Friedmann@weil.com](mailto:Jared.Friedmann@weil.com)>; Marcus, Jacqueline <[jacqueline.marcus@weil.com](mailto:jacqueline.marcus@weil.com)>  
**Cc:** O'Neal, Sean A. <[soneal@cgsh.com](mailto:soneal@cgsh.com)>; Barefoot, Luke A. <[lbarefoot@cgsh.com](mailto:lbarefoot@cgsh.com)>; Allen, Charles W. <[callen@cgsh.com](mailto:callen@cgsh.com)>; Kim, Hoori <[hokim@cgsh.com](mailto:hokim@cgsh.com)>  
**Subject:** RE: In re Sears Holdings Corp., No. 18-25358 (Bankr. S.D.N.Y.)

Good morning, Sam. We hope all is well.

We write concerning the closed claims associated with store numbers 1884 (King of Prussia), 1111 (Colorado Springs), 1300 (Oak Brook), and 3527 (Philadelphia) described in the attached documents (the "**Closed Claims**"). As the attached Schedule 1 to the Second APA Settlement Agreement demonstrates, the Parties have agreed that the Closed Claims, whose aggregate value is approximately \$95,000, belong to the Debtors.

Yesterday morning we reached out to Transform concerning the proceeds of the Closed Claims. Transform indicated it could not be of assistance. Can you provide us with any information concerning the Closed Claims and their proceeds?

Thank you,

Jennifer



Jennifer Brooks Crozier

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---

**From:** Levander, Samuel <[slevander@cgsh.com](mailto:slevander@cgsh.com)>  
**Sent:** Wednesday, May 20, 2020 9:19 AM  
**To:** Friedmann, Jared <[Jared.Friedmann@weil.com](mailto:Jared.Friedmann@weil.com)>; Marcus, Jacqueline  
<[jacqueline.marcus@weil.com](mailto:jacqueline.marcus@weil.com)>; Crozier, Jennifer Brooks <[Jennifer.Crozier@weil.com](mailto:Jennifer.Crozier@weil.com)>  
**Cc:** O'Neal, Sean A. <[soneal@cgsh.com](mailto:soneal@cgsh.com)>; Barefoot, Luke A. <[lbarefoot@cgsh.com](mailto:lbarefoot@cgsh.com)>; Allen, Charles W.  
<[callen@cgsh.com](mailto:callen@cgsh.com)>; Giunta, Brian <[bgiunta@cgsh.com](mailto:bgiunta@cgsh.com)>  
**Subject:** In re Sears Holdings Corp., No. 18-25358 (Bankr. S.D.N.Y.)

Jared,

Please see the attached correspondence from Transform Holdco LLC. The information provided in this letter includes Transform's internal assessment of pending litigation claims and therefore should be treated as Highly Confidential, as well as subject to F.R.E. 408. We understand that you are awaiting a counter from us on the overall resolution, but we wanted to provide these details now in the interest of time given the number of claims.

Best regards,  
Sam

---

**Samuel Levander**  
Cleary Gottlieb Steen & Hamilton LLP  
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<https://www.clearygottlieb.com/footer/privacy-statement>

Exhibit C

**From:** [Levander, Samuel](#)  
**To:** [Crozier, Jennifer Brooks](#); [O'Neal, Sean A.](#)  
**Cc:** [Friedmann, Jared](#); [Marcus, Jacqueline](#)  
**Subject:** RE: Sears - Litigation and Insurance Claims/Closed Claims  
**Date:** Tuesday, November 10, 2020 10:32:53 AM  
**Attachments:** [image001.jpg](#)

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Jennifer,

Thank you for the call Thursday and your follow-up email.

As we discussed, the contractual language of the Second APA Settlement Agreement is crystal clear: “[N]either Party shall be required to make any cash payment to the other Party pursuant to this Agreement, except in connection with the Vornado Claims, the Altaquip Claims, and the Bayamon/Panama City Claims as may be required pursuant to Sections 2 and 10(c) above, or in connection with any post-Execution Date Buyer Transition Services, as may be required pursuant to Section 9(b) above.” Second APA Settlement Agreement § 17(b).

That is, Transform has no obligation to make any cash payment pursuant to the Agreement, including with regard to the Closed Claims. To further clarify this point, this provision carves out four specific exceptions – (1) the Vornado Claims, (2) the Altaquip Claims, (3) the Bayamon/Panama City Claims, and (4) any post-Execution Date Buyer Transition Services – and the Closed Claims are not among them.

Section 18(a) of the Second APA Settlement Agreement further provides for a comprehensive and broad mutual release of any potential claims under, arising out of, or in connection with the Closed Claims:

*Upon the Effective Date, Transform and each of the Debtors, on behalf of itself, its controlled affiliates, and each and all of its and its affiliates’ respective past and present successors and assigns or any entity asserting a claim released hereunder either through or on behalf of any such parties (all such releasing persons and entities collectively, the “Releasing Parties”), does hereby fully, unconditionally and irrevocably release, relieve, waive, relinquish, remise, acquit and forever discharge the other Party and such other Party’s respective past, present and future agents, heirs, executors, administrators, conservators, successors, assigns, noteholders, participants, co-participants, direct and indirect parents, principals, subsidiaries, affiliates, related companies, shareholders, interest holders, investors, members, partners (including, without limitation, general and limited partners), managers, directors, representatives, contractors, service providers, receivers, attorneys and beneficiaries, and the past, present, and future officers, directors, and employees (all such released persons and entities, collectively, the “Released Parties”) from, against, and in respect of any and all past, present, and future claims, cross-claims, counterclaims, third-party claims, demands, liabilities, obligations, debts, liens, damages, losses, costs, expenses, controversies, actions, rights, suits, assessments, penalties, charges, indemnities, guaranties, promises, commitments, appeals, or causes of action of whatsoever nature, whether based in contract, tort or otherwise, whether in law or equity and whether direct or indirect, fixed or contingent, that any of the Parties have or may have against any of the other Parties since the beginning of time, under, arising out of or in connection with the Additional APA Disputes (all of the foregoing, the “Released Claims”), which*

*Released Claims shall include for the avoidance of doubt any right to claim an award of attorneys' fees or other costs and expenses incurred in, or in connection with, any of the foregoing.*

"Additional APA Disputes" is defined in the final whereas clause of the Second APA Settlement Agreement to include the "Litigation and Insurance Claims Dispute," which encompasses all of the Closed Claims described in your email below and any other matters involving the Litigation and Insurance Claims that could have been asserted by a Party as of the date of the settlement agreement.

The upshot is that Transform has no obligation to make any cash payment related to the Closed Claims, and the Debtors have released any potential claims related to the Closed Claims.

As discussed on our call on Thursday, we will liaise with our client in an effort to provide you with requested information regarding the Closed Claims, provided that you confirm that Transform will be entitled to reimbursement under the February 11, 2019 Transition Services Agreement and § 9(b) of the Second APA Settlement Agreement for any time spent by Transform personnel responding to any such requests.

Transform reserves all rights.

Best regards,  
Sam

---

**Samuel Levander**

Cleary Gottlieb Steen & Hamilton LLP

Assistant: [mdigiario@cgsh.com](mailto:mdigiario@cgsh.com)

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T: +1 212 225 2951

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---

**From:** Crozier, Jennifer Brooks <Jennifer.Crozier@weil.com>

**Sent:** Friday, November 6, 2020 6:11 PM

**To:** O'Neal, Sean A. <soneal@cgsh.com>; Levander, Samuel <slevander@cgsh.com>

**Cc:** Friedmann, Jared <Jared.Friedmann@weil.com>; Marcus, Jacqueline  
<jacqueline.marcus@weil.com>

**Subject:** Sears - Litigation and Insurance Claims/Closed Claims

Sean:

Yesterday we discussed the Debtors' efforts to recover on the Litigation and Insurance Claims (as defined in the Settlement Agreement by and between Transform and the Debtors dated September 17, 2020 (the "**Second APA Settlement Agreement**"))—specifically, those Litigation and Insurance Claims that Transform indicated were "closed" in Luke Barefoot's letter to Jared Friedmann dated May 20, 2020. For clarity, the Debtor-owned "closed claims" include the following claims:

Store	Recovery	Date of Loss
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1111 Colorado Springs	\$28,301.03	8/3/2018
3527 Philadelphia	\$13,500.00	11/16/2018
1884 King of Prussia	\$34,364.08	10/1/2010
2195 Titusville	\$384,391.00	9/1/2017
7622 Franklin	\$3,250.51	2/14/2015
45575 Stockton	\$50,000.00	7/24/2019
6735 Orange Park	\$793.68	1/8/2016
6735 Orange Park	\$2,568.84	11/4/2018
6347 Florida	\$369.58	12/15/2015
7134 Cortland	\$96,480.22	8/8/2013
2911 Bayamon	\$717.29	2/8/2018
3424 Gainesville	\$2,392.50	12/7/2018
4026 St. Joseph	\$40,790.00	1/11/2018
1300 Oak Brook	\$18,750.00	1/21/2019
<b>TOTAL</b>	<b>\$676,668.73</b>	

(the “**Closed Claims**”). See Second APA Settlement Agreement at ¶ 10(a) (“The Parties acknowledge and agree that any and all rights, title, or interest in, to, or under the Litigation and Insurance Claims listed in Category 1 of Schedule 1 attached hereto belong to the Debtors under the APA. Transform releases, waives, and relinquishes to the Debtors any and all right, title, and interest in, to, or under each of the Litigation and Insurance Claims listed in Category 1.”); *see also id.* at Schedule 1.

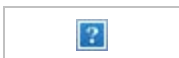
Please confirm (1) that Transform personnel will continue to provide the Debtors and their advisors with any information in their possession, custody, or control concerning, among other things, the disposition of the Closed Claims and the distribution of any and all proceeds associated with the Closed Claims and (2) that, to the extent **Transform** recovered the proceeds of any or all these Debtor-owned Closed Claims, Transform will promptly turn those proceeds over to the Debtors pursuant to the APA, the Second APA Settlement Agreement, and the provisions of the Bankruptcy Code. As I suggested yesterday, there is no colorable argument Transform can make that will justify a failure or refusal to turn those proceeds over to the Debtors.

Should you want to discuss the above, please let us know.

The Debtors reserve all legal and equitable rights and remedies with respect to all of the Litigation and Insurance Claims.

Thank you,

Jennifer



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Exhibit D

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 In the Matter of:

5  
6 SEARS HOLDINGS CORPORATION, Case No. 18-23538-rdd

7  
8 Debtor.

9 - - - - - x  
10 SAYVILLE MENLO LLC,

11 Plaintiff,

12 v. Adv. Case No. 19-08286-rdd

13 TRANSFORM HOLDCO LLC, ET AL,

14 Defendants.

15 - - - - - x

16  
17 U.S. Bankruptcy Court

18 300 Quarropas Street

19 White Plains, NY 10601-4140

20  
21 December 13, 2019

22 10:18 AM



1 B E F O R E :

2 HON ROBERT D. DRAIN

3 U.S. BANKRUPTCY JUDGE

4

5

6 HEARING Re 1) Motion of Realtor Carl Ireland, Administrator  
7 of the Estate of James Garbe, for an Order (I) Determining  
8 the Value of Relator's Collateral as of the Sale of such  
9 Collateral; (I) Determining the Amount of Any Diminution in  
10 the amount of the Sales Proceeds Allocable to such  
11 Collateral After the Sale; (II) directing Payment of  
12 Relator's Secured and Superpriority Administrative Claims;  
13 and (IV) Granting Related Relief (ECF 4931)

14

15 HEARING Re 2) Motion for Payment of Administrative Expenses  
16 for Vorys, Sater, Seymour and Pease LLP, Other Professional,  
17 period: 10/15/2018 to 10/15/2019, fee: \$18,182.50, expenses:  
18 \$67.98 (ECF 618)

19

20 HEARING Re 3) Motion to Compel: Motion of Debtors to Compel  
21 Turnover of Estate Property

22

23 HEARING Re 4) Fourth Plan Supplement in Connection with  
24 Modified Second Amended Joint Chapter 11 Plan of Sears  
25 Holdings Corporation and Its Affiliated Debtors (ECF 5335)

1 HEARING Re 5) Motion of Abel Santiago for Relief from the  
2 Automatic Stay (ECF 4640)

3  
4 HEARING Re 6) Motion to Kathleen Kime to Deem Proof of Claim  
5 as Timely Filed and for Relief from the Automatic Stay (ECF  
6 4945)

7  
8 HEARING Re 7) Motion of Angela Kelly and Janyce L. Mackenzie  
9 For Relief From the Automatic Stay to Permit Them to  
10 Continue to Prosecute a Personal Injury Action Against  
11 Sears, Roebuck & Co. in King County Superior Court in the  
12 State of Washington, and to Liquidate Their Claims in Such  
13 Action (ECF 4064)

14  
15 HEARING Re 8) Notice of Agenda of Matters Scheduled for  
16 Hearing on December 13, 2019 at 10:00 a.m.

17  
18 HEARING Re 9) Adversary proceeding: 19-08286-rdd Sayville  
19 Menlo LLC v. Transform Holdco LLC et al  
20 Stipulation and Scheduling Order signed on 11/5/2019  
21 Concerning the Amended Complaint or Motion to Dismiss

22  
23  
24 Transcribed by: Tracey Williams, Sherri L. Breach, Pamela  
25 Skaw, Nicole Yawn, and Jamie Gallagher

1 A P P E A R A N C E S :

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24

25

1 P R O C E E D I N G S

2 THE COURT: Okay, good morning. In re Sears  
3 Holdings Corp., et al.

4 MR. FAIL: Good morning, Your Honor. For the  
5 record, Garrett Fail, Weil, Gotshal & Manges for the  
6 debtors.

7 There are a number of items on today's agenda,  
8 but, with the Court's permission, I'd like to provide the  
9 Court with an update on the progress that the debtors have  
10 made in connection with the initial distribution that is  
11 scheduled to go out this afternoon.

12 THE COURT: Okay.

13 MR. FAIL: Thank you, Your Honor.

14 On October 15th, the Court entered the  
15 confirmation order approving, among other things, the  
16 Administrative Expense Claims Consent Program. The program  
17 provides, as Your Honor will recall, a multi-tiered process  
18 for processing and paying administrative claims.

19 After confirmation and after entry of the  
20 confirmation order on the 15th, the debtors mailed out  
21 notice of the program to 11,352 claimants -- potential  
22 claimants -- at 16,614 notice addresses in total, giving  
23 them 30 days from receipt of the notice to submit their  
24 election. We sent out on the very next day, on October  
25 16th, 13,101 packages, and, one week later, noticed an

1 additional 3513 parties that were not included and gave them  
2 30 days to opt in.

3 Your Honor will recall that ballots and creditors  
4 were divided into three categories based on their response  
5 or lack of response. The first is opt-in settled admin  
6 claims, claimants who affirmatively opt in for the program.  
7 That group was eligible to participate in the initial  
8 distribution and to receive up to 75 percent of the allowed  
9 administrative expense claim.

10 The non-opt-out settled administrative expense  
11 claims are parties who did not affirmatively opt in or opt  
12 out of the program, or those that were unable to meet the  
13 criteria for eligibility in the initial distribution, but  
14 who had opted in. This group is eligible to participate in  
15 the second distribution. And, as a consequence of opting  
16 in, they would have their claims reconciled quicker, but as  
17 a consequence of not being reconciled in time for the first  
18 initial distribution, they would receive 80 percent, an  
19 increased amount of their allowed administrative expense  
20 claim.

21 And then there's the non-settled administrative  
22 expense claims, folks that affirmatively opted out of the  
23 program. That group will be eligible to receive the full  
24 value of their allowed claims, if any, but they will not  
25 receive any distribution under this program; they are the



1 standard administrative expense claims.

2 Your Honor will also recall that the initial  
3 distribution is to be made from a cash pool of \$21 million  
4 that the debtors have been holding in a segregated account  
5 and this would be made available on or about December 1.  
6 That was an importance piece to the negotiation, Your Honor  
7 will remember.

8 The second distribution will be made upon the  
9 satisfaction of certain subsequent conditions and minimum  
10 funding requirements. And, for those parties that opted  
11 out, they'll receive payment upon the effective date of the  
12 plan.

13 Your Honor, in terms of the progress and what has  
14 happened subsequent to the mailing, the debtors received  
15 1206 affirmative opt-in ballots. The debtors determined  
16 that approximately 258, or 21 percent of that total in  
17 number and roughly 28 percent in amount, were duplicative  
18 claims, but that took work to ensure, in the debtors'  
19 opinion, that roughly 258 or 21 percent of everything that  
20 came in could be eliminated as duplicative, leaving --

21 THE COURT: You mean duplicative of another opt-  
22 in?

23 MR. FAIL: Exactly, Your Honor. Like --

24 THE COURT: Okay.

25 MR. FAIL: -- exact duplicates, because they

1 included perhaps an extra copy and, you know, please return  
2 one, or it could have been the case that they filed against  
3 multiple debtors.

4 THE COURT: Okay.

5 MR. FAIL: That left the debtors with 948 ballots  
6 to substantively review, after the review that eliminated  
7 258.

8 The debtors determined that 120 of those could be  
9 paid outside of the administrative expense program, either  
10 because they were professionals that submitted ballots out  
11 of an abundance of caution, but those are being paid  
12 separately, or they were by utilities that could be paid or  
13 may be paid either out of adequate assurance accounts, or  
14 possibly by Transform after reconciliation, or they were  
15 claims by taxing authorities. While significant in number,  
16 120, Your Honor, it's only less than one percent in the file  
17 amount, but, nonetheless, the debtors reviewed those. That  
18 left the debtors with approximately 828 ballots to review  
19 and to move forward with.

20 As disclosed in the notice that we filed with the  
21 Court earlier this week, the debtors reconciled and were  
22 able to allow 285 of the claims or ballots, that's  
23 approximately 34 percent of the total that were -- of the  
24 828 to be reconciled and allowed.

25 The total allowed amount of those claims was

1 \$64,364,904.91, a significant amount, and those parties will  
2 all share in the \$21 million initial distribution pro rata,  
3 and the calculation is approximately 32.63, by my math, Your  
4 Honor.

5 The debtors further did determine that they would  
6 not be allowing and they would either have to ask the  
7 creditors to withdraw or object to 204 of the other ballots.  
8 So when we're looking at the 828, we allowed 285, and the  
9 debtors determined after an analysis that it wasn't a matter  
10 of reconciliation for 204 ballots, approximately 24 of the  
11 ballots would need to either be dealt with by the Court as a  
12 matter of law or fact, because, for example, ballots were  
13 filed for claims that have already been subject to a pending  
14 objection; they've been addressed by an objection saying  
15 that they're not administrative claims; or, for example, in  
16 this significant amount of claims, folks asserted -- filed a  
17 ballot, but claims were barred by the bar date. The bar  
18 date included 503(b)(9) claims, parties that didn't assert a  
19 claim shouldn't be able to participate. So that's a bunch  
20 that were not allowed, but for reasons that we'll address  
21 with the Court subsequently.

22 Another significant ten percent, 89 ballots  
23 requested zero dollars. So the debtors processed those,  
24 they're not included in the payment, just as we're walking  
25 down the waterfall of what we had to look through. We'll

1 clean that up with the Court to give it one last chance  
2 through probably an omnibus objection process, but on the  
3 face of it, they've asked for zero dollars and that's  
4 another ten percent.

5 So at the end of this math, Your Honor, the  
6 debtors determined that there would be approximately 249  
7 claims that will be left to reconcile after the initial  
8 distribution. It's only 30 percent of the 828 and only 20  
9 percent in number of the initial 1206 claims and ballots  
10 that were asserted. It's still a very significant task, but  
11 a relatively small percentage of the overall asserted  
12 administrative expense claims. The ratio of allowed to to-  
13 be-reconciled, by my math, is greater than one-to-one.  
14 There were more claims allowed than remain to be reconciled.

15 A brief bit about the context for the process that  
16 we went through, Your Honor. The debtors' professionals  
17 worked with the UCC's professionals at FTI and Akin. We  
18 also worked and communicated and coordinated with the  
19 professionals for the ad hoc group that negotiated the  
20 settlement, including the attorneys at Foley.

21 There's consensus for moving forward with the  
22 distribution this afternoon. There is consensus around the  
23 claims that were allowed, the timing, and the process that  
24 was followed.

25 The Court will also recall that there are no --

1 THE COURT: When you say consensus, with whom?

2 MR. FAIL: That group --

3 THE COURT: Okay.

4 MR. FAIL: -- the debtors, the UCCs,  
5 professionals, and the parties that were the proponents of  
6 the lead advocates for the settlement --

7 THE COURT: Okay.

8 MR. FAIL: -- including Mr. Wander and the Foley  
9 group.

10 The Court will also recall that there are no  
11 employees of the debtors. The Court is aware of the  
12 records, detailed records about shipments and payments and  
13 timings, and whether there were goods delivered and were  
14 they valid and were there credits. The information is  
15 maintained by Transform and the personnel is now Transform.  
16 And M3 has been working diligently and hard with the  
17 debtors, you know, post-petition retained professionals, to  
18 access and to reconcile, but in terms of what is in the  
19 world of possible, the Court is aware of those facts.

20 The Court is also aware that, you know, this  
21 process was not expected to have major legal issues resolved  
22 prior to December 1st. In recognition of that, that parties  
23 would opt in to contribute towards the ultimate consummation  
24 of the plan. For issues that would need to be reconciled  
25 beyond December 1, there was an additional five-percent

1 incentive added, and the parties would get 80 percent rather  
2 than 75 percent recovery on their claims.

3 The debtors are also -- and the Court is also  
4 aware because of the public dockets -- and apologies for  
5 that -- that the debtors are pursuing preference actions by  
6 demand letters out of court and with several hundred  
7 preference actions that have been filed.

8 THE COURT: Well, before -- you're moving on to  
9 preference claims now.

10 MR. FAIL: No, just -- sorry, I apologize, Your  
11 Honor. I'm only bringing that up because, in our  
12 reconciliation efforts with creditors with whom we've  
13 engaged, and in the debtors' and the committees' and the  
14 UCCs' judgment in terms of what could be reconciled and  
15 should be, the debtors did factor in whether or not there  
16 was potential preference liability into the overall  
17 settlement. Certain creditors have insisted that it be a  
18 part of the conversation and the debtors have raised it with  
19 parties because --

20 THE COURT: Okay.

21 MR. FAIL: -- it is part of the calculus --

22 THE COURT: Right.

23 MR. FAIL: -- the money in, money out.

24 THE COURT: All right, so it relates to -- so what  
25 you're talking --

1 MR. FAIL: That's the only --

2 THE COURT: -- about now relates --

3 MR. FAIL: -- that's the only reason --

4 THE COURT: -- to reconciliation?

5 MR. FAIL: -- I was raising it, Your Honor.

6 THE COURT: Okay.

7 MR. FAIL: I don't have an update and don't plan  
8 on providing an update on the preferences themselves.

9 THE COURT: All right.

10 MR. FAIL: Your Honor, we did file the notice, I  
11 don't believe it was required of all of the allowed claims,  
12 but, you know, we've seen over the past 24 hours some  
13 filings, limited objections, objections. We've received  
14 inquiries, comments, phone calls, and emails from various  
15 creditor groups. I would say that certain parties wanted us  
16 to distribute money on December 1st and, you know, wanted it  
17 sooner. Some of them want it now and other parties say,  
18 well, I want in and I want to be added. Some parties are  
19 saying, you know, you didn't work hard enough to reconcile  
20 my claims and let me in, others are saying they need just a  
21 little more time to let them in now.

22 Your Honor, the debtors believe, and have  
23 conferred with the professionals from the UCC and the plan  
24 proponents, that we followed the process and that the  
25 process worked as it was intended to. Claims that were

1     asserted with timely ballots that fell within a range of the  
2     debtors' estimates were allowed. Those parties with whom  
3     the debtors were able to and believed reconciliation was  
4     possible for the greater good of all parties made it into  
5     the distribution. And the parties that have not been  
6     allowed in, in general, have a variance between what was  
7     asserted and what was on the debtors' books and records that  
8     is greater than the administrative costs to process and  
9     reconcile it. We are being practical in terms of how we're  
10    moving forward, both in terms of the administrative cost to  
11    reconcile and to bring it, but also in terms of the judicial  
12    impact.

13           THE COURT: So let me ask you --

14           MR. FAIL: Yes.

15           THE COURT: -- the following couple questions.

16    First -- and I'm not holding you to this as a specific  
17    commitment, but what is the debtors' general sense of the  
18    time it will take to reconcile the remaining opt-ins?

19           MR. FAIL: So we passed the first -- we believe  
20    we've passed the first major hurdle and the first major  
21    milestone in hopefully getting out the distribution this  
22    afternoon. The checks were cut; the files were locked down  
23    several days ago in order to get the distribution out today.

24           Moving forward, we're going to use a funnel  
25    approach that we've used in other major cases in the past



1 and that we've started to use with the administrative claims  
2 that have been filed and asserted to date. We're going to  
3 first try to filter and group like claims together, and  
4 probably proceed with omnibus objections where we think that  
5 there are legal issues. Ones that have been identified to  
6 date have reappeared in the balloting process.

7 So world imports, if those claims can't be settled  
8 in a manner -- you know, then Your Honor may have to decide  
9 what people are calling the world imports issue, what is a  
10 503(b)(9) claim. Another question which may come before the  
11 Court is, are drop-shipped claims 503(b)(9) claims if the  
12 debtors didn't physically receive goods.

13 So there's buckets which are currently pending  
14 objections where the Court might need to decide and our goal  
15 would be to combine as many, so they're all before you at  
16 the same time.

17 We think that there are others where it's the  
18 matter of collecting more information and then processing  
19 it. The debtors' professionals at M3 requested from the  
20 parties that submitted ballots additional backup that wasn't  
21 submitted with their claims and for many of those we think  
22 it's a matter of reconciliation and time. I don't have the  
23 estimate, because I don't have that number yet, but our goal  
24 would be to avoid court where possible, certainly for a  
25 dollar amount reconciliation.

1           And then there are going to be other major claims  
2       where, if the parties can't settle -- the debtors will  
3       certainly try -- there may be other issues. But, you know,  
4       our goal would be to filter and to bring before Your Honor  
5       in a staged manner for the debtors to control the process,  
6       working with the UCC's professionals and with the  
7       representative of the administrative expense claim holders,  
8       which will be appointed, elected, you know, decided after  
9       this first distribution on that process. We don't think it  
10      makes sense for a me-first, do mine now, I'm here.

11           We are all now aware that there are several  
12      hundred claims that have to be dealt with and it's up to the  
13      debtors, working with the professionals for the UCC and the  
14      administrative claimants to figure out how to best and most  
15      efficiently work that way forward. It doesn't make sense  
16      for people to say reconcile mine before the Court and bring  
17      the process, in our opinion; it may not be necessary. It  
18      may just be we need the data from M3 and we need the data  
19      from Transform.

20           THE COURT: So who -- if an opt-in non-reconciled  
21      or ineligible creditor wants to pursue quickly the allowance  
22      of their claim, who should they contact?

23           MR. FAIL: So, Your Honor, in our opinion, they  
24      all want them done quickly, as do the debtors. We share  
25      that goal and we're aware of them all. They've been logged,

1 they've been accounted for, and they've just now been  
2 disclosed to the Court. We would respectfully request that  
3 the debtors take the next step and make the next affirmative  
4 move in reaching out to parties, people who will otherwise  
5 be reaching out -- we might have the data, Your Honor, they  
6 have already provided --

7 THE COURT: I get -- can I --

8 MR. FAIL: Of course.

9 THE COURT: I understand there are legal  
10 categories, there are legal issues that might need to be  
11 decided and let's leave those aside for the moment, I gather  
12 that the debtors requested additional data, which they may  
13 have gotten or may not have gotten --

14 MR. FAIL: But both categories are true, we  
15 requested, and we either did in some --

16 THE COURT: Right --

17 MR. FAIL: -- and sometimes we didn't.

18 THE COURT: -- but those requests may be quite  
19 recent. It seems to me, if it's just a data issue, I'm not  
20 sure why there has to be sort of a global process. It would  
21 seem to me people can be focusing on the data, just like  
22 they did for the first wave, and deal with it.

23 MR. FAIL: The debtors are. We're not waiting for  
24 a global process. The debtors are reconciling the data --

25 THE COURT: Okay.

1 MR. FAIL: -- we are. I thought Your Honor asked  
2 how should people that are not being paid this first  
3 distribution let us know they want to go quicker --

4 THE COURT: Well, if it's --

5 MR. FAIL: -- we know about them.

6 THE COURT: -- if it's a data issue, then they can  
7 follow up right away with the debtor.

8 MR. FAIL: They've all had access and they've all  
9 been in contact.

10 THE COURT: Okay, all right. And --

11 MR. FAIL: There are Listserv set up, there's no  
12 lack of direct contact.

13 THE COURT: And it's clear to know who they should  
14 be dealing with?

15 MR. FAIL: Yes, Your Honor.

16 THE COURT: Okay. And then as to legal issues, I  
17 can see the benefits of staging them in an organized, global  
18 way, thematic way. It's also conceivable to me, however,  
19 that someone may want to settle that issue in advance.

20 MR. FAIL: We're certainly open to --

21 THE COURT: They're free to make a proposal on  
22 that, if they want to. Otherwise, if they want to just have  
23 a yes-or-no answer, you're going to tee that up in front of  
24 me?

25 MR. FAIL: Yes, Your Honor. We've been open to

1 settlements and we're going to be economically rational --

2 THE COURT: So if someone --

3 MR. FAIL: -- actors.

4 THE COURT: -- wants to make a proposal, they can  
5 -- who should they contact on a -- put it differently. If  
6 the reason that they didn't receive their pro rata share of  
7 the initial distribution was that they asserted a drop claim  
8 or a -- you know, some other right under 503(b) that the  
9 debtors are disputing on a legal basis and they want to  
10 settle that, they don't want to wait for a yes-or-no answer  
11 from the Court, who should they contact? Counsel or --

12 MR. FAIL: They can feel free to reach out to  
13 either counsel through counsel or the M3 Listserv that  
14 they've been in contact with with submitting the ballots.  
15 So --

16 THE COURT: Because they will then -- M3 will then  
17 contact you if it's a straight legal issue?

18 MR. FAIL: We've been in more than daily contact,  
19 Your Honor, on this process.

20 THE COURT: Okay, all right. And then my -- so  
21 the answer is there's not a clear end date to determine  
22 these, although one would hope that it would be in the next  
23 couple months, right, for a lot of them at least?

24 MR. FAIL: Your Honor, those are both true  
25 statements. I would also add, just for the context, there's

1 no prejudice in this -- there's no immediate prejudice to  
2 this. So parties, I expect, will say we have to agree on  
3 schedules with each individual within the next 30 days as  
4 the program provides. The program also allows us to amend  
5 it with the consent of the UCC and/or the admin  
6 representative.

7 So the debtors are incentivized to move this  
8 forward, but there's also no additional -- the second  
9 distribution is not scheduled, the money isn't available to  
10 go out the door, and so there's no prejudice if someone is  
11 not reconciled this week, next week, next month, at this  
12 point in time.

13 THE COURT: Well, that was my next question, which  
14 is when is the estimate that the second distribution would  
15 be made? Again, I'm not -- this is just an estimate.

16 MR. FAIL: Of course. I don't have that  
17 information available at this time. We can certainly  
18 provide additional information, we've been filing monthly  
19 operating reports, you know, somewhat regularly, and we can  
20 provide an estimate, but I can say now it is not imminent.  
21 No one will be prejudiced by several weeks or, you know,  
22 short months of having the debtors process and plow through  
23 and make progress.

24 THE COURT: Okay. So I don't -- this is -- I  
25 appreciate your just giving me this report --

1 MR. FAIL: Of course.

2 THE COURT: -- on the fly, there's no -- I didn't  
3 pull out the settlement order before this hearing. Are the  
4 debtors required to give some sort of notice before they  
5 make that second distribution?

6 MR. FAIL: One moment, please.

7 (Pause)

8 MR. FAIL: Your Honor, I don't believe there is a  
9 formal notice requirement; however, there are conditions  
10 that need to be satisfied. And, just like we did with this  
11 initial distribution, we intend to provide notice in advance  
12 of a second distribution. The debtors will be providing in  
13 advance notice of that distribution, there's no question.

14 THE COURT: All right.

15 MR. FAIL: Your Honor, I think that there were  
16 parties that filed objections, I don't know if -- I think  
17 they might be in the courtroom. They should have -- we have  
18 no issue with them being heard. There might be others on  
19 the phone that requested to dial in. I'm happy to respond  
20 to any other questions or kind of reserve --

21 THE COURT: Well, there are no objections that  
22 were scheduled for today --

23 MR. FAIL: No, Your Honor --

24 THE COURT: -- and I --

25 MR. FAIL: -- because there's nothing before the

1 Court. It's an automatic, we're supposed to proceed.

2 THE COURT: Right. And obviously I authorized the  
3 debtors to make the initial distribution to those who had  
4 allowed admin expenses who opted in. So, if you weren't  
5 allowed, then that was an issue.

6 MR. FAIL: And we're not reserving, because the  
7 function of -- there were questions that we received  
8 overnight, why aren't we reserving in this initial  
9 distribution. The purpose of this initial distribution was  
10 not to reserve, it was, if you're allowed, you get it and,  
11 if you're not -- you know, I can look back and see if we  
12 provided for a reserve in the second round or not, but, you  
13 know, that's a different story before the effective date.

14 It's crystal clear that for this initial  
15 distribution allowed get the pro rata and those that aren't  
16 reconciled and allowed move to stage two.

17 THE COURT: Which is a pro rata based on a larger  
18 denominator?

19 MR. FAIL: It's a catch-up. So, in other words,  
20 phase one doesn't get anything else, phase two gets up to  
21 the 32ish percent that I mentioned before phase one gets  
22 anything else, and then collectively they can be satisfied  
23 before the confirmation --

24 THE COURT: And then ultimately --

25 MR. FAIL: -- and consummation of the plan.



1 THE COURT: -- phase two also has a higher cap,  
2 the 80-percent --

3 MR. FAIL: It does have a higher cap --

4 THE COURT: -- cap?

5 MR. FAIL: -- in terms of the percentage of the  
6 allowed amounts.

7 THE COURT: Okay, all right. So just to summarize  
8 then where we are so far. The debtors will be diligently  
9 working to reconcile the remaining opt-ins. As far as where  
10 there are objections based on non-legal issues, they will be  
11 interacting with the claimants on the data, mostly through  
12 M3.

13 Where there are legal issues, the claimant is  
14 always free to make a settlement proposal, but failing that  
15 the debtors, with the creditors' committee and the admin  
16 group, so designated, will work out a process that's  
17 efficient to deal with legal issues on an aggregate basis,  
18 so that the briefing won't be done on the claimants' side by  
19 just one party, but will be done efficiently, so that people  
20 can weigh in on thematic legal issues.

21 MR. FAIL: Your Honor, I appreciate -- that's all  
22 correct. I appreciate your time this morning; I appreciate  
23 the continued access to the Court. We're trying to make  
24 this as efficient for judicial resources, as well as the  
25 debtors'.

1 THE COURT: Okay. So I know there's some people  
2 popping up, but why don't I hear from them --

3 MR. FAIL: Thank you, Your Honor.

4 THE COURT: -- briefly.

5 MR. HAWKINS: Good morning, Your Honor, Salah  
6 Hawkins from Cravath, Swaine & Moore on behalf of the  
7 administrative claimant Stanley Black & Decker, Inc.

8 And just briefly, Your Honor, I won't resuscitate  
9 everything that went through by the debtors, but I just  
10 would like to respond to a few points that they made, one  
11 being that there's a fundamental fairness issue here with  
12 the lack of notice. Under the terms of the consent --  
13 confirmation order, what should have happened is there was a  
14 30-day period during which there was a time to reconcile the  
15 claims and, prior to that date, we reasonably relied upon  
16 the fact that there would not be a distribution made without  
17 some form of notice to say, hey, you need to make sure that  
18 you give us everything that we need by a certain date in  
19 order to be included in the initial distribution. That's  
20 the first issue.

21 The second would be that what the debtors are  
22 doing here by filing the notice is making and taking away  
23 the bargained-for agreement that is in the confirmation  
24 order. When my client opted in, what they bargained for in  
25 that was to get the earliest possible payment that they

1 could get under the terms of the order and not to be pushed  
2 into the non-opt-out group under which there, as the  
3 debtors' counsel conceded, is no foreseeable date under  
4 which the second distribution would occur. That's not what  
5 my client bargained for, Your Honor.

6 And, third, as to the prejudice issue, there is a  
7 likelihood that there could not be payment at all or it  
8 could be a year from now, two years from now. We don't  
9 know, because those minimum conditions have to be satisfied  
10 first.

11 So with those three issues being before the Court,  
12 we don't feel that it's fair under the terms of the order to  
13 allow the initial distribution to go forward without at  
14 least including opting claimants like my client who were  
15 given no notice that this would be done in this form.

16 THE COURT: Well, what is the basis for the  
17 debtors' view that Black & Decker is not sufficiently -- its  
18 claim is not sufficiently reconciled to make the  
19 distribution?

20 MR. HAWKINS: Your Honor --

21 THE COURT: Is it a legal issue, is it an  
22 accounting issue? What is the basis?

23 MR. HAWKINS: Respectfully, Your Honor, we have no  
24 idea. There's been no communication. We submitted the data  
25 that they requested after -- after we gave the initial

1 ballot opt-in notice, they accessed -- they sent a request  
2 for information on December 1st. We responded and provided  
3 that information. And then there was no follow-up to say,  
4 okay, we're disputing your claim as to X amount, we think  
5 that there's no legal basis to your claim, we're doing X, Y,  
6 and Z. There was just no information.

7 The first thing that happened after that is that  
8 the notice was filed. And so prior to any reconciliation  
9 process being engaged in --

10 THE COURT: When was the notice actually filed?  
11 Again, this is something that --

12 MR. HAWKINS: It was filed --

13 THE COURT: -- I'm just basically --

14 MR. HAWKINS: -- on Wednesday, Your Honor.

15 THE COURT: -- having a case conference on,  
16 because there's really no -- when was the notice filed?

17 MR. HAWKINS: It was filed on Wednesday, Your  
18 Honor, Wednesday of this week.

19 THE COURT: All right.

20 MR. HAWKINS: And so -- and a part of that issue  
21 is, in looking at when the notice was filed, also you look  
22 under the terms of the order, it was supposed to be an  
23 initial distribution on or around December 1st. When that  
24 date passed, my client then reasonably relied upon the fact  
25 that there would be some notice of like, okay, well, it

1 probably won't happen before our 30-day reconciliation  
2 period and, if there is, it's reasonable for us to expect  
3 notice of when we need to give certain information or when  
4 we need to reach a consensual agreement.

5 THE COURT: Okay.

6 MR. HAWKINS: And if that doesn't happen, then  
7 what's happening here is kind of like the debtors are trying  
8 to have their cake and eat it too, right? Like part of what  
9 happened with the confirmation order is the debtors got the  
10 benefit of avoiding administrative insolvency that could  
11 have happened if they had to pay all the 503(b) claims in  
12 full. In exchange for not having to pay the claims in full,  
13 the benefits that were supposed to be given to our clients  
14 and opt-in claimants like my client was that they would get  
15 an earlier payment of at least a partial payment. By  
16 getting pushed into the non-opt-out group --

17 THE COURT: Well --

18 MR. HAWKINS: -- that benefit is no longer being  
19 given --

20 THE COURT: -- to me that depends. I mean, if  
21 there's a fundamental legal issue pertaining to the claim,  
22 then I don't think anyone should be surprised that they're  
23 not participating in the first distribution.

24 MR. HAWKINS: I agree, Your Honor.

25 THE COURT: If it's in a -- you know, if it's a

1 numbers issue, then I'm more sympathetic to what you're  
2 saying.

3 MR. HAWKINS: I agree, Your Honor, but we don't  
4 know, and that's a part of the issue --

5 THE COURT: Okay, all right.

6 MR. HAWKINS: -- is that nothing was said.

7 THE COURT: Okay.

8 MR. HAWKINS: And so the debtors' counsel stated  
9 that there is, you know, constant communication, but that  
10 has not been our experience, and based on the papers that  
11 were filed by other additional opt-in claimants, it hasn't  
12 been their experience either. People have reached out and  
13 just not been given any information here. So to allow them  
14 to, one, not provide --

15 THE COURT: After December 1st, you mean, when the  
16 notice went out?

17 MR. HAWKINS: After opting in, Your Honor, and  
18 after they requested information, there was just nothing.  
19 We got --

20 THE COURT: But the request for information was on  
21 December 1?

22 MR. HAWKINS: For our -- for my client, yes, Your  
23 Honor.

24 THE COURT: It may have been different for others?

25 MR. HAWKINS: Yes, Your Honor.

1 THE COURT: Okay.

2 MR. HAWKINS: With that, respectfully, Your Honor,  
3 we request that the Court not allow the initial distribution  
4 to happen today without including my client or that the  
5 Court set a later date for the initial distribution and  
6 request that the debtors provide some notice, at least ten  
7 days, of when the period will close to be included in the  
8 initial distribution.

9 THE COURT: Okay.

10 MR. HAWKINS: Thank you, Your Honor.

11 MR. FAIL: Your Honor, would you prefer that I  
12 respond in turn or --

13 THE COURT: No, let me just hear all of these.

14 MR. FAIL: Thank you.

15 MR. WEINTRAUB: Thank you, Your Honor. Good  
16 morning. William Weintraub of Goodwin Procter for  
17 Intralinks and Urban Edge. We are in pretty much the same  
18 category as counsel. We were requested to provide  
19 information and our clients did it timely, probably back in  
20 November, I believe, and then there was radio silence, we  
21 heard nothing. We assumed there was no problem or we would  
22 have heard something. I think it's completely unfair for  
23 the debtor and whoever they're working with to just  
24 unilaterally decide we'll pay this claim and not that claim,  
25 this claim is disputed, this claim we didn't get to, so I

1 guess it's disputed. We don't know what's going on.

2 And the unfairness here, Your Honor, is that this  
3 \$21 million train is about to leave the station. My client  
4 paid 25 percent of its claim to be on board this train. No  
5 one can tell us when the next train is coming or if another  
6 train is coming.

7 THE COURT: No, I get that, I get that point.

8 MR. WEINTRAUB: Okay, Your Honor.

9 THE COURT: Okay.

10 MR. WEINTRAUB: So, from our perspective, we think  
11 a reserve should be established. What is customary in  
12 bankruptcy cases when there's not enough to go around and  
13 you've got disputed and undisputed claims, what you do is  
14 you put into the denominator the disputed and undisputed  
15 claims, you figure out what the pro rata share is, but you  
16 only make distributions to the claims that you agree with.  
17 We would be okay with that so long as we know there's money  
18 left behind for the people who have been unilaterally just  
19 kept off the train, Your Honor.

20 THE COURT: Well, again, I think -- for example,  
21 if someone filed a duplicate claim or had, you know, a clear  
22 legal issue that is a gatekeeper as to whether it's an admin  
23 claim or not, I don't think there needs to be a reserve for  
24 that, that wasn't the deal.

25 I understand that --



1 MR. WEINTRAUB: But we don't know what it is, Your  
2 Honor. When you don't know --

3 THE COURT: Well, that's fair, that's fair, but  
4 I'm looking at these in different -- in terms of what's fair  
5 in different -- depending on the nature of the objection.  
6 It seems to me --

7 MR. WEINTRAUB: But we don't know when they --

8 THE COURT: No, I understand that point, but on  
9 the other hand, if the nature of the objection is, you know,  
10 this is a duplicate claim or you're asserting a claim under  
11 503(b) when the issue has been out there for a long time as  
12 to whether you're entitled to it, that's different than  
13 favoring some people who have a number that's been  
14 reconciled and others who have an accounting issue and that  
15 that's not been reconciled yet.

16 MR. WEINTRAUB: I understand, Your Honor. Neither  
17 of my clients have 503(b) claims, number one. Number two, I  
18 get it, if there's a duplicate claim, you pay on one of  
19 them.

20 But with respect to my client, Your Honor, and I'm  
21 really pretty much only here because I live a few minutes  
22 from the courthouse, my client is owed \$50,000, it agreed  
23 that it would take the 25-percent haircut. If somebody had  
24 called --

25 THE COURT: So can I have one --

1 MR. WEINTRAUB: -- Your Honor, could I just --

2 THE COURT: -- one other point that hasn't been  
3 addressed with either of the two -- with you or that person  
4 who spoke before you for Black & Decker, which is the  
5 interplay of the preference issue with this.

6 MR. WEINTRAUB: I'm not aware that we have any  
7 preference issues; no one has told us that, Your Honor.

8 THE COURT: No one has identified a preference  
9 issue. Okay.

10 MR. WEINTRAUB: But, Your Honor, just to go back  
11 to -- because you gave me some hypotheticals, I'm giving you  
12 a real world scenario.

13 THE COURT: All right.

14 MR. WEINTRAUB: My client is owed \$50,000. If  
15 counsel had called and said, you know, we can't reconcile  
16 your claim, it only comes out to \$49,999, do you know what  
17 our answer would have been, Your Honor?

18 THE COURT: Yeah -- no, I understand --

19 MR. WEINTRAUB: Okay.

20 THE COURT: -- I understand that point.

21 MR. WEINTRAUB: We were not given an opportunity  
22 to do that.

23 THE COURT: Okay.

24 MR. WEINTRAUB: And what's galling is, we didn't  
25 get the request for information on December 1st, we got it a

1 long time before that, number one. And, number two, not to  
2 cast aspersions, but I'm pretty sure, Your Honor, that they  
3 asked for the exact same information that was attached to  
4 our claim. So we provided it again. We were given no  
5 insight into the request for information as to what the  
6 potential problem was, they just asked for basic documents  
7 and invoices, which was provided.

8 THE COURT: Okay.

9 MR. WEINTRAUB: So our request would be either  
10 hold up the distribution, so the rest of the people can  
11 catch up, or do a reserve, which we think is customary in  
12 circumstances like this.

13 THE COURT: Okay.

14 MR. WEINTRAUB: Thank you, Your Honor.

15 MR. MILLER: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. MILLER: Jonathan Miller from the Sarachek Law  
18 Firm on behalf of OXO, SJ, and Strong Progress. I really  
19 reiterate what the other gentlemen said. The thing that I  
20 would add is attempts to communicate were not successful  
21 often. Calls to the phone number that were provided on the  
22 M3 email went to a voicemail that just said voicemail full.  
23 Emailing the email address on the M3 email, I don't know if  
24 anybody responded to those or not.

25 Reaching out, I've reached out to the debtors as

1 well to try and see what was going on, because it kind of  
2 became apparent around December 6th, one of our clients in  
3 China got an email saying, hey, send us to this address  
4 information.

5 It wasn't until I contacted Mr. Griffin, I  
6 believe, at M3 that finally I started getting some response,  
7 and then the response was basically, too bad, only one of  
8 your clients is going to be included of the four that opted  
9 in. And then I sent a further email just saying, okay, was  
10 there a date by which they had to have information, what is  
11 the process, and I've heard nothing.

12 So it just seems that this is a very arbitrary  
13 procedure. As the other gentlemen said, the bargain these  
14 people made by opting in is we're going to give up part of  
15 our claim because we're going to negotiate with the debtor.  
16 I mean, that's what the program says, you opt in, you  
17 negotiate with us over the value of your claim. I think the  
18 reality is -- and there may be some exceptions -- there was  
19 no negotiation at all. The debtor went through claims, made  
20 decisions, and then basically it was tough luck for  
21 everybody else.

22 As others have said, there was no date given to  
23 any of the creditors, suggesting, if you don't opt -- if you  
24 don't provide information by this date, then you're out of  
25 luck. They had up until November 25th, the creditor --

1 these creditors, to decide whether to opt in or opt out, and  
2 that's a very tough decision for them. These foreign  
3 vendors, some of them are really barely scraping by.

4 THE COURT: All right, so -- I'm sorry. I thought  
5 the date to opt in was earlier than November 25th --

6 MR. MILLER: As --

7 THE COURT: -- that was the opt-in date?

8 MR. MILLER: -- Mr. Fail stated, there was another  
9 batch that went out --

10 THE COURT: Oh, okay, there's a second --

11 MR. MILLER: -- and these three --

12 THE COURT: -- a second-month batch, I got it.

13 MR. MILLER: -- particular clients were in that  
14 second batch and had until November 25th. And --

15 THE COURT: All right.

16 MR. MILLER: -- I will say, Weil was kind enough,  
17 one of the clients requested an extra two days because they  
18 claimed they had never gotten the information, they were  
19 kind enough to give until November 27th.

20 MR. FAIL: So we responded to that email, so we  
21 had a dialogue on that one already.

22 THE COURT: Okay, so -- but that deadline -- but  
23 that deadline --

24 MR. MILLER: Okay, well --

25 THE COURT: -- but let me --

1 MR. MILLER: -- but none of the others, Mr. Fail.

2 THE COURT: -- so that's the second batch?

3 MR. MILLER: Yes.

4 THE COURT: Okay. All right, fine.

5 MR. MILLER: So the clients complied with what was  
6 required --

7 THE COURT: Well, it's a very tight deadline for  
8 the second batch, obviously.

9 MR. MILLER: I don't dispute that, Your Honor, but  
10 there was nothing -- there was nothing that was received  
11 saying we need info -- you know, we know you're late --

12 THE COURT: And remind me, why was there a basis  
13 to do a second batch?

14 MR. FAIL: Your Honor, just a correction. There  
15 was one week delay in notifying certain parts. We notified  
16 whatever it was, 13,000 out of the 16,000 --

17 THE COURT: right.

18 MR. FAIL: -- on the first day, we didn't -- they  
19 weren't included on the mailing. We caught the error and we  
20 noticed them.

21 THE COURT: Okay, all right.

22 MR. MILLER: But, Your Honor, it wasn't --

23 THE COURT: It was another --

24 MR. MILLER: -- that deadline wasn't tight.

25 THE COURT: -- it's another week, though.

1 MR. FAIL: It's one more week, but it's only tight  
2 when parties like with Stanley Black & Decker and maybe your  
3 clients waited 30 days to respond.

4 THE COURT: Well, but --

5 MR. FAIL: It wasn't tight if they had sent in,  
6 like many people did, early on.

7 THE COURT: Okay --

8 MR. MILLER: But that was their right.

9 THE COURT: -- but the actual deadline was the  
10 25th.

11 MR. FAIL: And we included those and we gave the  
12 same amount of time for the parties with the late filing.  
13 That's why when we delayed the distribution to December 6th,  
14 in working with the UCC and the Foley group and checked, you  
15 know, with the admin creditors, we gave the same amount of  
16 time to reconcile. To accomplish a distribution on December  
17 1st, you cannot cut it off --

18 THE COURT: I understand.

19 MR. FAIL: -- November --

20 MR. MILLER: And just to be clear, Your Honor,  
21 nobody is disputing the issues that there's a large amount  
22 of opt-in ballots to go through. I am very sympathetic to  
23 the issues that the debtor and the UCC and M3 had to go  
24 through, but I am not sympathetic to the idea that no  
25 information was communicated about, if you don't have your

1 information in by this date, then you're out. One of our  
2 clients got the email from M3 on December 2nd, which I'm  
3 guessing might have been too late as a matter of course to  
4 even be included.

5 And, again, it's not -- the idea isn't to cast  
6 aspersion, it's to say this process was arbitrary, it wasn't  
7 consistent with the administrative claims consent program  
8 that was approved as part of the confirmation order where  
9 clients were led to believe that, if they opt in, they would  
10 be getting the right to negotiate with the debtor over their  
11 claim.

12 THE COURT: Well, although there is a -- there was  
13 a distribution date there. So --

14 MR. MILLER: But --

15 THE COURT: -- the negotia -- I mean, if you --  
16 there is a certain sense that, you know, if you opt in  
17 pretty late, you're running the risk that you won't have a  
18 lot of time to negotiate.

19 MR. MILLER: And maybe it should have been --  
20 possibly. I mean, here's the thing, there could have been a  
21 thing or some notice that said, if we don't get your  
22 information by X date --

23 THE COURT: But it's kind of common sense, right,  
24 that you --

25 MR. MILLER: Yes and no. I mean, they also put it



1 right up to the deadline. It could have -- there could have  
2 been thing --

3 THE COURT: Well, that's -- Mr. Fail, when was the  
4 last information request? Not follow-up request, but the  
5 last --

6 MR. FAIL: These are all follow-up. They're  
7 conflating the points, Your Honor. We asked for information  
8 when we received ballots, the fact that his client got an  
9 information request on December something means to me and  
10 what he's saying is, his client submitted a ballot late  
11 November. When we looked at the ballot late November, at  
12 the end of their 30-day window, we saw we didn't have enough  
13 information, so we requested it. And that information may  
14 be useful in the next round of reconciliation; it wasn't  
15 wasted, it wasn't an admission that we needed -- that the  
16 information they gave us is right. The point was we needed  
17 the information; we'll use that information in phase two.  
18 He waited and there was a greater variance between the  
19 amount asserted and the amount that the debtors' books and  
20 records reflect for that claim. And if --

21 THE COURT: All right. Well, let me --

22 MR. FAIL: -- his claimant is from Asia, I'm  
23 guessing also that it's a world import issue.

24 MR. MILLER: Right, but they -- but the claimants  
25 that --

1 THE COURT: Well, that's a separate issue --

2 MR. MILLER: -- opted in --

3 THE COURT: -- but let me ask --

4 MR. FAIL: I know, but that's his issue.

5 THE COURT: -- let me ask --

6 MR. MILLER: -- were willing to negotiate that.

7 MR. FAIL: That's your issue.

8 MR. MILLER: No, no.

9 THE COURT: But I'm focusing -- I mean, I've been  
10 very clear -- on those legal points, but on the just simple  
11 information requests that don't relate to the world import  
12 timing points --

13 MR. FAIL: It was -- they literally were sent out  
14 in seriatim based on the receipt when we know who to  
15 contact. We canvassed everybody, said give us your claim  
16 and what you owe. When it matched, we didn't necessarily  
17 need information; when it didn't, we'd say we can't figure  
18 it out, we don't know who you are. It's cheaper and easier  
19 for you to give us the data --

20 THE COURT: And when did that --

21 MR. FAIL: -- than to go to Transform --

22 THE COURT: -- but when did that step take place  
23 in --

24 MR. FAIL: It's continuing, it's --

25 THE COURT: No, but in -- I didn't finish -- when

1 did it take place after the claim came in -- or after the  
2 election came in?

3 MR. FAIL: As soon as the ballots came in, they  
4 went out.

5 THE COURT: The info request?

6 MR. FAIL: Yeah.

7 THE COURT: Okay, all right.

8 MR. MILLER: Can I just very quickly, Your Honor,  
9 because I know you want to move on, but as to the world  
10 imports issue that was mentioned. The clients that decided  
11 to opt in, right -- because we have clients that didn't opt  
12 in, they opted out, because they want to pursue their full  
13 claim -- clients that opted in had the reasonable belief  
14 under the terms of the program --

15 THE COURT: That someone would --

16 MR. MILLER: -- and the confirmation order --

17 THE COURT: -- that someone would negotiate with  
18 them over that point?

19 MR. MILLER: That they can negotiate that point.

20 THE COURT: All right, okay.

21 MR. FAIL: Just the last point in rebuttal, Your  
22 Honor, I think it's half the story. They opted in and they  
23 gave up 20 or 25 percent, but they got paid before  
24 consummation of the plan. That wasn't mentioned by Mr.  
25 Sarachek's firm, that's the benefit they're not waiting for

1 the effective date.

2 THE COURT: No, I understand that, I understand  
3 that. Okay.

4 MR. GLASS: Good morning, Your Honor --

5 UNIDENTIFIED SPEAKER: Your Honor, I --

6 THE COURT: No, excuse me, ma'am, someone -- you  
7 can't see him, but he's -- someone else is speaking in the  
8 courtroom. I'll let the people speak on the phone once the  
9 people in the courtroom are done.

10 MR. GLASS: Thank you, Your Honor. Good morning.  
11 I'm Fred Glass; I'm with Fair Harbor Capital. We purchased  
12 six 503(b)(9), what we believe are 503(b)(9) administrative  
13 claims in the case. We received the ballots, the opt-in  
14 ballots, and we filled them out for all six. That was on  
15 November 14th. On November 19th, five days later, they sent  
16 us a correspondence asking for a detailed Excel sheet about  
17 all our claims with lists of all our invoices, invoice  
18 numbers, purchase order numbers, just a huge list. We  
19 provided it, it looks like that day, everything.

20 When we purchase claims, we try to do due  
21 diligence before we do that. I know that courts aren't  
22 always -- look favorably upon claims traders, but we do feel  
23 like we do step into the shoes of the claims that we  
24 purchase.

25 And so we did provide everything the day they

1 asked for it. Then we didn't hear anything from them,  
2 nothing. We just assumed -- we have clean claims, at least  
3 we think we have clean claims, we wouldn't have bought them  
4 if we didn't think they were clean, and then they went ahead  
5 and didn't -- we heard nothing from them until the next  
6 thing we got was on -- it was December 11th from M3 Partners  
7 we got a correspondence, it basically looked like asking for  
8 the same information, which we provided again, and then  
9 asking us and, by the way, send us your mailing information  
10 so we know where to send the checks. So we just expected  
11 checks to be on the way.

12 The next thing I get is -- I guess it was  
13 Wednesday -- it was yesterday morning actually, I received  
14 an email that was sent out at 10:45 p.m. on Wednesday night,  
15 and I received it Thursday morning on my phone. When I woke  
16 up in the morning to take a shower, I see that, oh, take a  
17 look at this, and I know I have six claims and I see only  
18 two of them are listed on the list.

19 So I feel I was completely surprised. I thought  
20 my claims were clean, no one ever gave me any indication  
21 they weren't clean. We don't have -- I didn't believe when  
22 we took them that we had any drop-ship legal issues. I  
23 think one claim may have been a duplicative claim, because  
24 they sent duplicative ballots, one to the original creditor  
25 and one to us. So we got those ballots and, out of an

1 abundance of caution, we filled out those ballots, because  
2 that's -- we did that out of a matter of caution, not  
3 because we were claiming two claims. But we didn't receive  
4 any correspondence or anything from anyone then.

5 So this was yesterday morning when I got that.  
6 Then I'm scrambling, trying to make phone calls, sending  
7 emails. My partner is making phone calls, sending emails to  
8 the debtors' counsel, to M3, to Prime Clerk, which was  
9 responsive, and I felt like I was stonewalled, basically.  
10 Finally, last night I reached debtors' counsel and he was  
11 very courteous. And he said, well, you know, there's  
12 nothing I can do, the checks are cut and we're not going to  
13 recut checks, you know, for different pro rata amounts, you  
14 know, to add you. And in a nice, very, very courteous, very  
15 professional, he did this, but basically said you're out of  
16 luck.

17 So I'm here now to say --

18 THE COURT: Okay.

19 MR. GLASS: -- I think this process -- I think  
20 when the process was put in place it was intended to be  
21 fair, I think the implementation of this process is what's  
22 unfair, and I just -- I think there's some due process  
23 issues -- noticing issues, due processing issues. I just  
24 feel we didn't have a chance to even discuss claims that we  
25 thought were crystal clear and were never given an

1 indication asking for more information about, ever.

2 THE COURT: Okay. I'm --

3 MR. GLASS: That --

4 THE COURT: -- I'm going to cut you off there. I  
5 get the point, though.

6 MR. GLASS: Thank you very much.

7 THE COURT: Okay.

8 MR. WANDER: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. WANDER: David Wander of Davidoff Hutcher &  
11 Citron. I rise on behalf of Pearl Global in support of the  
12 debtor and the distribution, Your Honor.

13 No one is more sympathetic than I am to the  
14 complaints that people have made about the implementation of  
15 the program. The solution, though, is not to hold up the  
16 distribution, because that opens up a Pandora's Box which  
17 then in itself really is a collateral attack on the  
18 confirmation order, which I've been accused of doing, but  
19 I'm not doing; I'm here to support it.

20 We had a bargain, the settling creditors, who I  
21 spoke to before today -- and they couldn't be here because  
22 of personal reasons, but I joined into the settlement and we  
23 settled. And one of the most important things that the  
24 Foley group made clear was the sacrosanct nature of the  
25 December 1st distribution.

1 Now, I was upset that checks were not cut on  
2 December 1st, but I understood that there was some noticing  
3 issues. And in the big scheme of things I felt that, with  
4 respect to that, what the debtor had proposed was the most  
5 fair and reasonable way.

6 It's now December 13th. The bargain that we  
7 struck, the settling creditors, the opt-in program, the  
8 order by Your Honor, was that under the settlement program,  
9 warts and all, there was going to be a cutoff and a  
10 distribution on or about December 1st. Again, I'm  
11 sympathetic to all the problems that people have mentioned,  
12 but the solution is worse than the problem. The solution  
13 means no one gets money and it can undo the whole  
14 confirmation, because it can be months for reconciliation to  
15 happen. I tried pointing that out beforehand.

16 But now that we have a confirmed order by Your  
17 Honor and under that confirmed order the distribution was  
18 required to go out on or about December 1st, the checks have  
19 been cut and I submit, Your Honor, in the context of  
20 everything that has happened, the distribution needs to go  
21 out, otherwise it can open up the whole confirmation issue.  
22 And I support the debtor today in making the initial  
23 distribution. Thank you.

24 THE COURT: I don't want to hear more back and  
25 forth on this. I'm happy to hear anyone else who wants to



1 speak, but I don't need to have rebuttal or anything like  
2 that.

3 So I think the people in the courtroom are done.  
4 If someone on the phone wants to say something, they should  
5 feel free to at this point.

6 MR. LABOV: Your Honor, this is Paul Labov, Foley  
7 & Lardner, on behalf of the Ad Hoc Group. Can I just make a  
8 few points where I think some of the objectors were missing?

9 THE COURT: Okay.

10 MR. LABOV: So, as Your Honor knows, the admin  
11 claims consent program (indiscernible) is really a  
12 foundational principal that Mr. Lardner sort of just  
13 (indiscernible) me with that, and that's the December 1  
14 initial distribution date was actually a fundamental  
15 principle of the admin claims consent program. That's what  
16 all of these administrative claim holders bargained for.  
17 They said, yes, we'll take a substantial haircut; however,  
18 it needs to get paid by December 1. And that was sort of --  
19 that was the whole foundational principle.

20 One of the things that I think Your Honor  
21 mentioned and that it's so clear, whether it was the first  
22 notice, the second notice, the plan confirmation -- the plan  
23 itself, the order in the plan and the attachments thereto,  
24 both areas, December 1 was always set forth. So if you  
25 wanted to be in this program and you wanted to receive a

1 distribution on or about December 1, you need to be allowed  
2 and reconciled by that date. If you wait and you sat on  
3 your hands and you decided, well, I'm going to think about  
4 it and take some time, then it was possible you would have  
5 gotten pushed past the December 1 and, therefore, not  
6 received the distribution.

7 So I guess the whole issue here is, notice went on  
8 November -- October 15th, notice went out again the next  
9 week -- everybody knew as of October 15th what the program  
10 was when Your Honor confirmed the plan -- in both those  
11 notices, December was set forth as the sacrosanct date.

12 And in addition, Your Honor may recall -- I don't  
13 know, but you may recall, Your Honor, that it was very  
14 important at the end of November or (indiscernible) the  
15 beginning of December to get an admin claims representative  
16 up and ready and running, which we've already now been in  
17 the process to do that, and that was going to be decided by  
18 anybody who opted in, they would have a say at the table as  
19 to who that person may be, so that we could get the bigger  
20 legal issues run the appropriate way.

21 So what I heard today was "arbitrary," people were  
22 objecting to arbitrary. In fact, Your Honor, every day, I  
23 can attest that in fact it was methodical and deliberate in  
24 terms of how the notices went out and how negotiations went.  
25 And if you slipped past because you didn't, that was on you.

1 It's in the document itself.

2 And so, again, we were the proponents of the plan,  
3 and I'm happy to answer any questions the Court may have or  
4 anybody may have with respect to how it was done.

5 THE COURT: Okay. All right. Well, I appreciate  
6 that given the timing of this settlement program, someone  
7 who wanted to opt into the program should realize they could  
8 not sit on their hands, but what I'm hearing today is that  
9 there were, I believe, a significant number --

10 MS. CURLEY: Your Honor?

11 THE COURT: -- of people who didn't sit on their  
12 hands --

13 MS. CURLEY: Hello?

14 THE COURT: -- and just waiting to hear --

15 MS. CURLEY: Your Honor?

16 THE COURT: I'm sorry, I thought we were done.

17 MS. CURLEY: Oh, I'm sorry, Your Honor. It's --  
18 I'm Julie Curley appearing on behalf of an administrative  
19 creditor, Buyer (sic) Corporation. I --

20 THE COURT: Ma'am, are you going to be making the  
21 same point that several of the other people have already  
22 made?

23 MS. CURLEY: I am not, Your Honor.

24 THE COURT: Okay.

25 MS. CURLEY: I just wanted to note for the record

1 that on behalf of Buyer Corporation, my client responded to  
2 the information request on November 18th and which was  
3 nearly a month ago without any response. So --

4 THE COURT: So it is the same point. I got that  
5 point. And in fact I was about to --

6 MS. CURLEY: Okay.

7 THE COURT: -- finish saying that I think those  
8 people really did not sit on their hands. They were waiting  
9 for a response, having provided information in sufficient  
10 time to get a response, to negotiate, to do something. I  
11 think it's fair to say that the debtors and the people  
12 working on this were somewhat overwhelmed by the number of  
13 people who responded.

14 I also appreciate that timing is important here  
15 and it seems to me that, given the number of claims you have  
16 here and the categorization that I think has been done based  
17 on what Mr. Fail has told me, that you could reasonably set  
18 a reserve, so that money could go out promptly to those who  
19 are already on the list, but set a reserve for people who  
20 are subject to -- who would fall into two categories.

21 Category one is the group of people whose claims did not  
22 fall into the list that was submitted yesterday or the day  
23 before because of simple accounting issues, where they  
24 provided the back-up information at least a week before the  
25 extended deadline, which I guess was today, and didn't get a

1 response.

2 If you made a timely request and people have not  
3 yet responded, you wouldn't have to set a reserve for them,  
4 and if they didn't -- you know, if they didn't respond with  
5 at least a week to deal with them, then you wouldn't have to  
6 set a reserve for them. So that's just on the numbers side.

7 On the -- if the basis for the omission from the  
8 list is that they fall into a legal category, you know, the  
9 drop-ship date issue, the world important issue, some other  
10 issue that pertains to 503(b) that's in dispute -- not  
11 whether they are pre or post generally, but as a disputed  
12 legal issue -- you should set a reserve for them, but they  
13 should be given notice that they have a limited time to try  
14 to settle that issue with you, and I'm thinking maybe ten  
15 days. So you give the notice and before you're in, they  
16 settle, and if they don't, you're just going to have to cut  
17 another check to the other group.

18 I think -- I think --

19 MR. FAIL: Your -- yeah --

20 THE COURT: -- put it differently. On that issue,  
21 I think it really was part of the understanding that, if you  
22 opted in, you were opting into a process that could include  
23 settling those legal issues.

24 MR. FAIL: Yeah. Your Honor, I hear what you're  
25 saying and if that's your ruling, that's your ruling. I

1 think the understanding of the debtors, the UCC, the admin  
2 creditors that made the proposal is this was designed for  
3 the, you know, roughly half, more than half the number that  
4 asserted a claim within a variance of roughly, you know, ten  
5 to 15 percent of the debtors' estimate, and that we knew and  
6 to incentivize parties to do that. Where there was a  
7 discrepancy we knew it was going to take longer, and I think  
8 to ask the debtors within the next ten days, you know, or  
9 whatever to then reconcile 260 --

10 THE COURT: No. I'm not saying --

11 MR. FAIL -- (indiscernible).

12 THE COURT: I'm not asking you to do that. I'm not  
13 asking you to do that. I'm saying set a reserve on the --  
14 just on the accounting numbers and on the world import folks  
15 who fall into those types of categories, make the  
16 distribution to the others. It will be a lower amount, but  
17 it will be made. The committee can get up and running. And  
18 you may promptly make a second distribution on the world  
19 import people if they don't settle within ten days.

20 And the other people, I just think you need to give  
21 them at least, again, probably ten days to deal with this.  
22 I mean, I just -- there has to be some ability to respond to  
23 -- not on an objection basis, but just for this  
24 distribution. If it can't be done, it can't be done. But I  
25 think what they're complaining about is that they didn't

1 really get anything back --

2 MR. FAIL: Okay.

3 THE COURT: -- once they sent the information in.

4 MR. FAIL: So we'll provide them -- so what's going  
5 to have to happen is the -- no distribution can go out  
6 today. It will take another maybe, you know, week to get  
7 the initial distribution re-cut.

8 THE COURT: Well, I'm not sure -- why would it take  
9 that long? I mean, you have these claims categorized,  
10 right?

11 MR. FAIL: No, but the checks were physically ready  
12 to be dropped in the mail by 3:30 today. They can't be re-  
13 cut, like --

14 THE COURT: Well, but --

15 MR. FAIL: -- they can't --

16 THE COURT: I know you would have to re-cut it. I  
17 don't know why it would take a week to re-cut them?

18 MR. FAIL: We have to figure out -- it takes some  
19 time to get the money to the bank and the bank to just make  
20 the checks up. But we're -- it takes a couple of days and  
21 this is now a new process that I (indiscernible) with Foley  
22 and the UCC.

23 THE COURT: Well --

24 MR. FAIL: That's okay. We --

25 THE COURT: I mean, look --

1 MR. FAIL: We just have to do --

2 THE COURT: -- alternatively, if you want to just  
3 send these people a notice that you have -- you know, that  
4 we are going to work in the next ten days, say, to resolve  
5 all of this and then the distribution can go out and you  
6 don't have to have a reserve, I'm -- that may be  
7 appropriate, too.

8 MR. FAIL: That may -- that probably --

9 MR. LABOB: Your Honor --

10 MR. FAIL: -- makes more sense economically.

11 MR. LABOB: Your Honor, this is Paul Labob from the  
12 ad hoc group. This is a complete re-characterization of the  
13 --

14 THE COURT: I disagree, sir, completely with what  
15 you're saying. I'm sorry. It just didn't work. It is not  
16 fair to someone that sent in their information --

17 MR. LABOB: Well --

18 THE COURT: -- didn't hear back --

19 MR. LABOB: Yeah.

20 THE COURT: -- then provided a response timely and  
21 didn't hear back, and it's just not right. And what you're  
22 really talking about is not 14 days of not getting the  
23 money. What you're really concerned about is two things,  
24 one of which I'm perfectly happy to resolve today, which is  
25 that your group can be the group. I don't have any problem



1 with that, and you should start working on --

2 MR. LABOB: Oh, no.

3 THE COURT: -- on the process. The other point is  
4 it's quite clear to me that the people that are in this  
5 group will be getting a bigger share of the pro rata if this  
6 -- if what is proposed before I've intervened happens, and  
7 that's just not fair. It's not right.

8 MR. LABOB: Well, Your Honor, what I was going to  
9 suggest was I don't disagree with you. But -- well, I don't  
10 think we had any idea about the admin representative. I  
11 don't know if that's what you were saying, but that's not  
12 where this is going.

13 What I was -- what I was simply going to suggest  
14 was, and I think your second point is right. The idea was  
15 the sooner we got in, the better off we were, you know, the  
16 more haircut you took from the debtor, the more  
17 reconciliation from the debtor. The idea was behind the  
18 entire program was that this is how it would work.

19 So my only suggestion was with respect to the -- I  
20 don't know which claims you're referring to when  
21 (indiscernible), but whichever ones those are, what I was  
22 simply going to suggest was they should have the time that  
23 Your Honor is giving them, but let that come in from  
24 proceeds that are already at the estate, but not part of the  
25 21 million. So let the 21 million go out to everybody that

1 followed the program, and then Your Honor has given  
2 everybody a sufficient amount of time to reconcile whatever  
3 this -- you know, this issue is Your Honor is discussing.

4 And there is money in the estate from preferences  
5 or wherever else, and let them take their pro rata share to  
6 be in the same percentage as the initial distribution so  
7 that, therefore, nobody is harmed. It doesn't-- the money  
8 is there. It's not like the money is not there. That way -  
9 -

10 THE COURT: Well --

11 MR. LABOB: -- everybody is on the same playing  
12 field.

13 THE COURT: -- that was my suggestion question of  
14 the debtors, when can you make the second distribution, and  
15 the answer was very vague. And so hearing that, I'm not  
16 prepared to leave these people with that vague answer. I'm  
17 not -- I mean, if there was --

18 MR. LABOB: (Indiscernible).

19 THE COURT: -- if there was significant money to  
20 make a prompt second distribution I would understand that  
21 point. But that wasn't the answer I got.

22 MR. LABOB: No. No. Your Honor, I'm sorry.  
23 That's a different issue. The second distribution under the  
24 admin claims consent program is a defined term and that term  
25 defines a situation where there's certain money to pay, you

1 know, the holder in reserve for litigation against Mr.  
2 (indiscernible) and so on and so forth. That's not what I  
3 was suggesting.

4 I was suggesting that there is money in there now  
5 that instead of reserving the 21 million, I don't know what  
6 the number is here, but we could make a -- we'll call it a  
7 1(a) distribution, not a second, a 1(a) distribution such  
8 that the people that are in the courtroom today and have,  
9 you know, filed this issue and Your Honor is saying there's  
10 an accounting issue and it needs to be responded to  
11 immediately, those people, there is money in the estate to  
12 pay those people under the program.

13 And so you could make a second distribution in ten  
14 days or seven days, assuming that their claims are allowed,  
15 you know, worked out between the parties. There is money to  
16 do that. This is not the "Second Distribution." That is a  
17 much larger distribution that will come in future months and  
18 so on and so forth. This is just a 1(a) distribution, I was  
19 suggesting so that we keep (indiscernible) and we allow  
20 these people who have apparently not heard from the debtor  
21 who did not sit on their hands to --

22 THE COURT: These people did not sit --

23 MR. LABOB: -- participate in the --

24 THE COURT: -- on their hands. They didn't sit on  
25 their hands.

1 MR. LABOB: Right.

2 THE COURT: They just didn't. All right. Again, I  
3 want to be clear, the reserve is for someone that promptly  
4 provided their information in a way that the debtor could  
5 have actually analyzed it and negotiated with them. I'm  
6 assuming that's about another, you know, another week to ten  
7 days. And it's just -- I don't know what else is left over.  
8 I don't know who else would be looking to that money. You  
9 know, the deal was \$21 million. It wasn't \$25 million or  
10 \$30 million or, you know, so this is --

11 MR. LABOB: Right.

12 THE COURT: -- to me this is not -- the result of  
13 sending the checks out today is just not consistent with the  
14 program. If someone didn't provide a response timely to an  
15 information request, they did sit on their hands and I  
16 understand that.

17 But I think that people should -- if, you know,  
18 someone responded on November 19th with their documents and  
19 then didn't hear anything, that's not what was contemplated.  
20 It just isn't. And, similarly, if the basis for withholding  
21 the money is that there's a legal issue with the drop ship,  
22 the world import issue, I think people legitimately expected  
23 that someone would reach out to them and tell them that's  
24 the basis, and then you have a reason to negotiate. And  
25 that should happen quickly because that's why they say they

1 made the election.

2 And I appreciate you're going to get -- you're  
3 probably going to get your money about a month late, but  
4 it's just -- it's just not right for these other folks.  
5 It's not their fault.

6 MR. LABOB: Well, I agree with that. I agree that  
7 it -- I agree with everything you just said, Your Honor. My  
8 only suggestion was there is money to --

9 THE COURT: Well, but I don't --

10 MR. LABOB: -- move things forward.

11 THE COURT: -- I don't know where that goes, when  
12 it goes, but that would also affect the second distribution.  
13 So I just -- I don't think we can do that.

14 MR. WANDER: Judge, if I may, David Wander on  
15 behalf of Pearl Global.

16 My concern is that there will end up not being a  
17 first distribution and that it's not --

18 THE COURT: No.

19 MR. WANDER: -- going to be another month from  
20 December 1st.

21 THE COURT: No. We're -- again, we're not talking  
22 about a reconciliation. We're talking about a reserve. I'm  
23 hearing from Mr. Fail and I think it may make sense that it  
24 may take longer than I thought it would to set up that  
25 reserve and make the distribution.

1 MR. WANDER: Your Honor, I'm --

2 THE COURT: I'm not saying that the reserve will be  
3 fully distributed within a month, although the portion that  
4 is attributable to the world import issue will be. So  
5 you're just talking about the portion that's attributable to  
6 people that -- where they're just, you know, over ten  
7 percent or 15 percent or whatever the cutoff was on the  
8 accounting issue.

9 MR. WANDER: Your Honor, I think that the -- this  
10 is not -- again, I fought hard and in the end I settled.  
11 And I tried bringing up before Your Honor, before the order  
12 was entered, that there might be problems like this, but  
13 things went forward.

14 THE COURT: Right.

15 MR. WANDER: And so I'm living with the agreement.  
16 And my concern, Your Honor, is the agreement that was part  
17 of the confirmation order is now being changed --

18 THE COURT: All right. So what are your damages --

19 MR. WANDER: -- and --

20 THE COURT: -- 30 days of interest, because the pro  
21 rata portion is not legitimate damages because these people  
22 aren't entitled anymore than the people who I've heard from  
23 today to get the money. So, yeah, you can sue -- you can  
24 have an additional admin claim for 30 days of interest.

25 MR. WANDER: Your Honor, if it turns out to be 30

1 days, that's not the problem.

2 THE COURT: All right.

3 MR. WANDER: And I have other clients who didn't  
4 get into the program the way they should, but their solution  
5 -- this is not, in the end, going to --

6 THE COURT: But this wouldn't apply --

7 MR. WANDER: -- be a solution.

8 THE COURT: -- to them. This only applies, again,  
9 to people who got a information request and timely responded  
10 and then didn't hear anything.

11 MR. WANDER: I understand. I understand. I'm just  
12 saying that if we go forward with what the Court's solution  
13 is, it's not going to help those people. In the end I  
14 believe you're going to find out we're not going to have a  
15 distribution this year.

16 THE COURT: Well, I -- I don't understand why not.  
17 They're -- it's to set up --

18 MR. WANDER: Because I --

19 THE COURT: -- it's to set up a reserve. It's not  
20 to -- your client will have a distribution certainly by year  
21 end. It will just be lower than is on that piece of paper  
22 that was filed Wednesday night or Thursday morning.

23 MR. WANDER: Your Honor, I don't -- Your Honor, I  
24 would welcome --

25 THE COURT: Why would you think that wouldn't be --

1 I mean, that's the whole point of a reserve, that the people  
2 who are not reserved for, who are already allowed get  
3 something.

4 MR. WANDER: Because I don't believe the  
5 implementation of the plan is designed to resolve and  
6 negotiate the legal issues. And that's --

7 THE COURT: You have -- on the legal issue you have  
8 -- I'm contemplating like a week to ten days to negotiate  
9 the world imports' types of issues. And if you can't do it,  
10 too bad because the way that the plan actually worked, you  
11 would only really have that once you knew that that was the  
12 issue. You would only have about that much time because you  
13 had a December 1 drop dead date.

14 But you had to be given some amount of time to  
15 respond to the debtors saying you're all set except for the  
16 world imports issue. The spread there is X hundred thousand  
17 dollars. You know, are you prepared to make us a settlement  
18 offer on that. If they don't do that within, you know, a  
19 week of getting the debtors' response, then they're not in  
20 the reserve anymore. Then they fall into Group 2.

21 MR. WANDER: Your Honor, I've expressed my concerns  
22 about the timing of the --

23 THE COURT: But I -- what doesn't work on that? I  
24 don't understand that point. They have a deadline, you  
25 know, and the other people, you know, they -- I can't



1       imagine you can't get to the bottom of the information  
2       exchange, again, in a prompt time by year end with them --

3               MR. WANDER:   Your Honor, I'm --

4               THE COURT:   -- because that was all the time  
5       everyone else had, too, is basically a couple of weeks after  
6       you submit your information and then there's a request.

7               MR. WANDER:   Your Honor, I don't want to repeat my  
8       points.   I'm just stating based --

9               THE COURT:   Okay.

10              MR. WANDER:   -- upon the knowledge that I have, I  
11       just don't think this is --

12              THE COURT:   But what knowledge is -- I mean, I --  
13       if it doesn't --

14              MR. WANDER:   Because I --

15              THE COURT:   -- happen, it doesn't happen.

16              MR. WANDER:   Because --

17              THE COURT:   Again, on the world imports, if it  
18       doesn't happen, they fall out of the reserve.   On the other  
19       point, it just -- I don't even know how many people we're  
20       talking about, but they're just in a reserve.

21              MR. WANDER:   I think there are more people than  
22       have just been --

23              THE COURT:   On the -- above the 15 percent or  
24       whatever that aren't there because of world imports or  
25       because of a preference?   I mean, I --

1 MR. WANDER: I think there are more --

2 THE COURT: Well, I mean, I --

3 MR. WANDER: I think there are more problems with  
4 the implementation and my concern is that --

5 THE COURT: But what are they?

6 MR. WANDER: I --

7 MR. LABOB: May I answer the question, Your Honor?  
8 This is Paul Labob, and I hear what you're saying. So if  
9 Your Honor's ruling is, is there a way to say, okay, well,  
10 if you got information from the debtor, we're going to look  
11 at all pleadings where you've gotten information back at a  
12 certain time and we'll reserve for that amount.

13 In other words, we shouldn't allow people now to  
14 come in today and say, oh, we want to be part of it now, we  
15 want to be part of it.

16 THE COURT: No, not at all. Absolutely not.  
17 Absolutely not.

18 MR. LABOB: Okay.

19 THE COURT: This would only -- the reserve would  
20 apply to people where the debtor requested information --  
21 I'm told that all of the information was requested like the  
22 day after the claim came in or the election form came in.  
23 So I'm just focusing on whether there was a prompt response  
24 to that information request.

25 And if there was a prompt response, and I'm

1 assuming, you know, within a week, then there should be a  
2 reserve because where the debtor didn't then say or where  
3 the debtor then said nothing.

4 MR. WANDER: I think, again, I have a lot of  
5 disputes as to whether there was a prompt response --

6 THE COURT: Well, it depends. I mean, I think you  
7 should pick a date, either a week or ten days, whatever it  
8 is.

9 MR. WANDER: I'm just saying, Your Honor, I think  
10 that you're going to have not just dozens, maybe hundreds of  
11 disputes over --

12 THE COURT: Why? I mean, that's --

13 MR. WANDER: Because I don't --

14 THE COURT: -- there's a date. There's an email.  
15 There's a -- you know, there's a date that you know -- that  
16 each person that stood up today said, we got the request on  
17 X date. We responded either the next day or within a couple  
18 of days or a week. You know, obviously if someone responds  
19 outside of what would be a reasonable deadline, they  
20 shouldn't fall into this group.

21 But if they responded promptly and then there was  
22 no response thereafter, they should be in the group that's  
23 reserved for.

24 MR. WANDER: Your Honor, I'll just leave my  
25 comments as they are. I just --

1 THE COURT: Well --

2 MR. WANDER: -- that's what I --

3 THE COURT: -- I mean, if --

4 MR. WANDER: I fear it's --

5 THE COURT: There's an email -- MII -- M3, I'm  
6 assuming, put a date when they asked for the information,  
7 right?

8 UNIDENTIFIED SPEAKER: No.

9 UNIDENTIFIED SPEAKER: No, Your Honor.

10 THE COURT: They didn't put a date -- no. No. Not  
11 a date when they wanted it back, but a date when they  
12 requested it?

13 MR. FAIL: Yes, Your Honor. We have a record of  
14 when we made the request.

15 THE COURT: All right. So, look, there's a  
16 December 1 deadline. So I'm assuming that if the request  
17 was made when the -- I mean, December 1 is when the money  
18 goes out. Everyone assumes that's when the money goes out,  
19 right? There was no correspondence to people saying the  
20 money's not going to go out until months -- weeks later,  
21 right?

22 MR. FAIL: In full disclosure, a number of parties  
23 with substantial -- a number of parties, not a large number  
24 of parties, did ask -- I spoke to one last night. The  
25 amount in dispute with that party is significant and they --

1 that party realizes we weren't going to come to a  
2 resolution. I can't say that parties didn't reach out and  
3 say, if I wait can I have a little bit more time.

4 THE COURT: I'm not talking --

5 MR. FAIL: I'm not making that representation.

6 THE COURT: Look, I -- everyone realizes that  
7 December 1 is the distribution date.

8 MR. FAIL: Yes.

9 THE COURT: Okay. So if the debtor makes an  
10 information request, as I'm told it did, promptly after the  
11 ballot is submitted, if that information is not provided  
12 within at least a week before December 1, they shouldn't be  
13 getting in the reserve unless, I guess, they're in this  
14 second batch because that -- you have to add another week to  
15 that. So that would be, you know, a week after that  
16 deadline.

17 So they had a week. I mean, I -- they have to -- I  
18 guess the one exception is if the debtor actually told them,  
19 you have more time, then you would reserve for them, too.  
20 But that's a one off because that's part of your  
21 negotiations.

22 MR. FAIL: All right. Thank you, Your Honor. I  
23 appreciate that.

24 On behalf of the debtors, we appreciate your time.  
25 We know this wasn't on the agenda. It wasn't what the

1 debtors came in asking for. But --

2 THE COURT: No, I know that.

3 MR. FAIL: No, but, Your Honor, the reason the  
4 debtors came forward today was for the process and the due  
5 process, and in that regard --

6 THE COURT: Okay.

7 MR. FAIL: -- it's exactly what we wanted. We --

8 THE COURT: All right. And as far as --

9 MR. FAIL: -- got the Court's view and we  
10 appreciate it.

11 THE COURT: And as far as the world import, I think  
12 you have to build in for them that same week that we're  
13 talking about. You know, whatever you told them, if it's a  
14 world import issue, build in a week --

15 MR. FAIL: We will have to tell them that it's a  
16 world --

17 THE COURT: -- for negotiations, not --

18 MR. FAIL: -- import issue.

19 THE COURT: -- for them to respond, for it to be  
20 done. So they need to respond right away. I'm assuming  
21 they've thought about this already to make their response.

22 MR. FAIL: I appreciate that, Your Honor.

23 THE COURT: Okay.

24 MR. BASS: Your Honor, I apologize. I didn't -- I  
25 wanted to just get some clarification. This is David Bass

1 from Cole Schotz. I represent Lifetime Brand.

2 We did provided information, but we provided it  
3 earlier this week. There was an expectation that certainly  
4 that 30 day period where the parties were going to discuss  
5 resolution would have governed the (indiscernible) of claim  
6 timing on the 18th. We provided the information. We had to  
7 gather some information. But we --

8 THE COURT: right.

9 MR. BASS: -- provided it earlier this week on the  
10 10th.

11 THE COURT: Well, look --

12 MR. BASS: I don't think --

13 THE COURT: -- you may not have heard me because I  
14 was talking pretty fast, but the one exception to my week to  
15 provide the information was if the debtors said, we're  
16 negotiating this first batch still and, you know, we'll give  
17 you more time. I think you need to set a deadline and, you  
18 know, that's a separate group where there should be a  
19 reserve.

20 But other than those actual commitments by the  
21 debtor, if the debtor didn't extend some time, then I'm  
22 going by what people should reasonably be held to, which is  
23 the -- as far as the first batch, the December 1st deadline  
24 and I think as to the second batch the December 7th deadline  
25 or December 8th deadline.

1 UNIDENTIFIED SPEAKER: Your Honor, I don't want to

2 --

3 MR. BASS: Your Honor, I'm not sure I understand.

4 The expectation was you had a 30 day negotiating window. We

5 filed a claim on the 18th of December -- I'm sorry -- of

6 November. We provided the information on December 10th, you

7 know, (indiscernible) holiday week. The information -- no

8 one responded and said the information is inadequate. It's

9 --

10 THE COURT: But --

11 MR. BASS: -- a numbers issue. It's --

12 THE COURT: -- how would you have a --

13 MR. BASS: -- (indiscernible). It's not a --

14 THE COURT: But, sir, how would you have a 30 day

15 negotiating window when the payment is supposed to be made

16 on December 1st? So, again, unless the debtor --

17 MR. BASS: (Indiscernible).

18 THE COURT: -- gave you an extension in respect of

19 the first distribution and you timely complied with that, I

20 don't see how you could reasonably expect that providing

21 information on December 10th would be consistent with a

22 program that assumed that the money would go out to

23 undisputed claims on the first.

24 MR. BASS: Because there was no mention that on

25 December 1st, if you hadn't reconciled your claim by



1 December 1st you would lose that right --

2 THE COURT: No. That's --

3 MR. BASS: -- (indiscernible).

4 THE COURT: That's not right. That's not right.

5 The way the program work -- they weren't going to just make  
6 a payment to anyone that asserted a claim.

7 MR. BASS: But the point -- Your Honor, mine is not  
8 a 503(b)(9) claim. It's not a legal claim. It's a numbers  
9 claim. It was you submit, you know, payments through the  
10 vendor system electronically. They have all the  
11 information. Then our ballots were consistent with that  
12 information.

13 THE COURT: When did they ask --

14 MR. BASS: (Indiscernible) --

15 THE COURT: When did they ask your client for the  
16 information that they wanted?

17 MR. BASS: I believe it was November 19th.

18 THE COURT: All right. So there was plenty of time  
19 to respond then. You didn't have to wait till December 10th  
20 knowing that the distribution would be made on the 1st.

21 MR. BASS: We were gathering -- we were gathering  
22 information. I mean, yes, we -- there was nothing in there  
23 that says if you don't have the claim reconciled by December  
24 1st -- forget about what Your Honor is saying is  
25 (indiscernible), it's not in there in the words. The expect

1 -- the documents said the claim would be reconciled within  
2 30 days.

3 THE COURT: That's different than that the money is  
4 supposed to go out on the 1st. So it will be reconciled  
5 promptly, but -- that doesn't mean that you're going to get  
6 payment in the first group.

7 MR. BASS: It does, Your Honor. When you're --  
8 when you spend the entire \$21 million on -- without getting  
9 -- giving people the opportunity to have that 30 day  
10 reconciliation period.

11 THE COURT: You -- what -- I'm sorry. I don't have  
12 it in front of me. Is there anything that says you have a  
13 30 day no matter when?

14 MR. WANDER: Your Honor, I have it in front of me.  
15 What it says is, and this is for the initial recovery. It  
16 says to be -- the reconciliation is to be completed within  
17 30 days from the date of receipt of the opt-in ballot. So  
18 the opt-in ballot drives the 30 days. And in my client's --

19 THE COURT: Look, you know what? If people are not  
20 going to do something like this, we'll just do it on notice.  
21 I'm sorry. This is just -- I probably shouldn't have taken  
22 this up anyway. I was hoping we could resolve this. It  
23 seems to me totally illogical to assume that you're going to  
24 make a December 1 distribution and have 30 days when you  
25 submit it on a deadline that's a week before December 1. It

1 doesn't work.

2 So I -- it doesn't work and I -- why don't you give  
3 it to me? I'll take ten minutes and look at it. All right.  
4 Give me the --

5 MR. WANDER: Okay. Your Honor, this is my  
6 handwritten thing.

7 THE COURT: No. I don't want a handwritten thing.  
8 I want the docket --

9 UNIDENTIFIED SPEAKER: Your Honor, we have copies  
10 of the order.

11 MR. WANDER: All right. Then I --

12 THE COURT: You know what? I'm going to take this  
13 after lunch. I'm going to do the rest of the calendar.  
14 Everyone else has been very patient on this issue. We spent  
15 two hours on it already. No one has -- it -- all the people  
16 who have spoken to me, this is the first time I've heard of  
17 30 days. All right.

18 UNIDENTIFIED SPEAKER: It's in the order, Your  
19 Honor. I'm sorry.

20 THE COURT: Did you mention it? Did he mention it?  
21 No. What he mentioned was we didn't have enough time to  
22 respond to the thing --

23 UNIDENTIFIED SPEAKER: Well, Your Honor --

24 THE COURT: -- not 30 days.

25 UNIDENTIFIED SPEAKER: -- not to -- I'm not looking

1 for 30 days.

2 THE COURT: Look, I'm just -- forget about --

3 UNIDENTIFIED SPEAKER: Please, Your Honor --

4 THE COURT: -- forget I said any of that. We're  
5 not going to deal with it now. I'm going to sit down.

6 Someone is going to give me the full order of the full  
7 program and then I will decide this issue.

8 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

9 THE COURT: And meantime someone from M3 should  
10 come up with a little bit more information as about who  
11 falls into the first group and who falls into the second  
12 group and how fast they can decide and negotiate with them.  
13 All right. And they can leave the courtroom to do that or  
14 go into the conference room with their personal device.

15 I mean, we have been talking about admin claims for  
16 six months now.

17 Okay. So the actual first matter on the agenda is  
18 the turnover motion.

19 MS. CROZIER: Thank you, Your Honor. And may it  
20 please the Court, Jennifer Crozier, Weil Gotshal & Manges  
21 for the debtors on the debtors' motion to compel turnover of  
22 estate property.

23 The debtors' motion concerns more than \$5.5 million  
24 in refunds of property taxes that the debtors' paid to Cook  
25 County, Illinois in 2013, 2015 and 2016, years before the

1 debtors sold their assets and operations to Transform under  
2 the asset purchase agreement. These Cook County tax refunds  
3 belong to the debtors and Transform does not dispute that.  
4 They didn't dispute it in the November 11th letter refusing  
5 to turn over the refunds to the debtors and they do not  
6 dispute it in their objection to the debtors' motion for  
7 turnover.

8 Transform doesn't dispute that the Cook County tax  
9 refunds belong to the debtors because they can't. Section  
10 2.2(h) of the APA makes unambiguously clear that the debtors  
11 interest in or right to any refund, rebate or credit of  
12 taxes imposed on the acquired properties for any pre-  
13 assignment tax period, for all intents and purposes any pre-  
14 closing tax period, are excluded assets not transferred to  
15 Transform under the APA.

16 So, in short, such refunds belong to the debtors.  
17 Your Honor has examined Section 2.2(h) and agreed. At the  
18 July 11th, 2019 hearing on the debtors' motion to enforce  
19 the APA, this Court held that the EDA funds belonged to the  
20 debtors pursuant to Section 2.2(h), noting that the parties  
21 could not have drafted a more specific --

22 THE COURT: Can I --

23 MS. CROZIER: -- provision.

24 THE COURT: Can I interrupt you? I don't think  
25 there's any -- I agree with you. There's no dispute that

1 this money is the debtors' money. I think the issue --  
2 which is different than the EDA money -- is that someone  
3 this got into the cash management system, or at least that's  
4 what's claimed by Transform. And, therefore, it's wrapped  
5 up in the series of disputes about what should be spat out  
6 of that system once you reconcile what the debtors owe to  
7 Transform and what Transform has of the debtors. And  
8 whereas the EDA money was paid directly to the debtors as  
9 opposed to in the cash management system.

10 So what I don't understand is how this money got  
11 into the cash management system. I mean, if it was a check  
12 payable to the debtors, how -- it's not like credit card  
13 receipts that just run through the daily cash management  
14 system or other types of payments like that, or payments  
15 made by Transform on account of the debtors, which is all --  
16 that's the, in a nutshell the dispute over what comes out of  
17 the cash management system.

18 I don't know how this got in there. I mean, how  
19 would -- how did they actually negotiate the check?

20 MS. CROZIER: Right, Your Honor. That's -- that is  
21 the all important question here today. And I can refer you  
22 to Exhibit B of my declaration, appended to our motion for  
23 turnover. But -- or I can hand you a copy if you don't have  
24 one.

25 But the checks were sent with cover letters

1 addressed to debtor entities, but they were sent -- they  
2 were intended for debtor entities. It's clear on the face  
3 of the check and on the face of the cover letter. But they  
4 wound up --

5 THE COURT: Well --

6 MS. CROZIER: -- at --

7 THE COURT: -- that's the question I have.

8 Transform didn't buy the stock of the entity that was the  
9 payee on the check, right?

10 MS. CROZIER: I don't believe that's the case, Your  
11 Honor.

12 THE COURT: Okay. So how did Transform cash the  
13 check? I mean, I -- if I move out of my apartment, right --  
14 I'm Mr. X. I move out of my apartment and mail comes to me,  
15 a social security check, John Smith. Bill Jones, who now is  
16 in my apartment, can't cash John Smith's check and put it  
17 into his bank account.

18 So that's really -- if there's a valid reason for  
19 it to be in the cash management system, I think Transform is  
20 right. It's all part of that dispute. But that's the issue  
21 I don't -- I don't know how that happened, what -- I don't  
22 know if the money came in and was deposited by Sears. I  
23 don't think so because your affidavits suggest otherwise.  
24 You know, Sears, the debtor, not post-acquisition debtor.

25 But it seems from the affidavit that this money

1 came in post-acquisition and was cashed not by the debtor,  
2 but by Transform. But can --

3 Mr. Liman, are you here on this one?

4 MR. LIMAN: Your Honor, I am.

5 THE COURT: Do you know the answer to that  
6 question?

7 MR. LIMAN: I'm checking --

8 THE COURT: Okay.

9 MR. LIMAN: -- with -- to find out the answer to  
10 that.

11 THE COURT: Okay.

12 MR. LIMAN: I don't know.

13 THE COURT: Because I think that's -- I mean, I  
14 think if it's -- if Transform just somehow said we're Sears  
15 and didn't have a right to say, we're Sears, then, yes, the  
16 money should be paid over. If somehow it was put into the  
17 account by Sears or Transform owns the stock, then I think  
18 it's all part of the reconciliation that the 706 expert is  
19 doing. Even though this aspect of the reconciliation should  
20 be crystal clear, it's all subject to the other adjustments.

21 MS. CROZIER: So, Your Honor, the debtors' position  
22 is that it did not validly wind up in the cash management  
23 system, and so for that reason it should be outside the cash  
24 reconciliation process and turned over to the debtors.

25 THE COURT: Okay. Well, is there anything more to



1 say on this? I mean --

2 MR. LIMAN: Your Honor, except maybe just to  
3 suggest, Your Honor, I think we have your ruling with  
4 respect to it. We can find out the facts --

5 THE COURT: It's just a factual matter.

6 MR. LIMAN: We can talk to the debtors and we'll  
7 apply Your Honor's ruling.

8 THE COURT: Okay. I mean, someone cashed the  
9 check. You know, the old adage, he who takes what isn't his  
10 and gives it back or goes to prison. And I think this not -  
11 - I don't think Transform had a right to cash the check.

12 Now maybe -- if you could show me somehow that it  
13 did, then that's a different story.

14 MR. LIMAN: We'll -- Your Honor, we'll find out the  
15 answer and we'll discuss it --

16 THE COURT: All right. So that should happen --

17 MR. LIMAN: -- with the debtors.

18 THE COURT: -- really fast because I have an  
19 affidavit that says it didn't, you know, that they didn't  
20 have a right to cash the check, that it was sent to the  
21 wrong address, to the right person, the debtor, but to the  
22 wrong address and that somehow it -- and I think it is -- it  
23 has been cashed. It's not just being held, right?

24 MR. LIMAN: No. I believe it has been cashed.

25 THE COURT: All right. So I don't think that -- I

1 don't see how anyone had authority to do that.

2 MR. LIMAN: I -- Your Honor, I'll find out the  
3 answer to it. I've got a -- I could go through lengthy  
4 argument, but I --

5 THE COURT: So can I --

6 MR. LIMAN: -- I think you've heard lengthy  
7 arguments today.

8 THE COURT: I mean, I went back and I think the  
9 objection was correct, that if it is validly in the cash  
10 management system, I dealt with this in July on page --  
11 well, 194 to 196, and said that, you know, as part of the  
12 whole reconciliation, this -- you know, at that point I gave  
13 people a deadline. It's way past the deadline now because  
14 you're all trying to work it out. But it's really covered  
15 by the cash management reconciliation, iii of the 706  
16 expert's work plan.

17 But if it's -- if it was, you know, improperly  
18 cashed or endorsed, then it's not.

19 MR. LIMAN: We're still exploring the information.

20 THE COURT: Okay. So I'm going to set a deadline  
21 on this one of next Friday. And I mean it's either -- I  
22 mean, it should be really clear. I mean, there should be  
23 some backup as to if there -- if Transform says, no, we had  
24 a right to do it, you should provide the debtors with  
25 something. And if there's still a dispute over that issue,

1 then I'll hear it at the next omnibus day. But I have a  
2 feeling that the facts will be clear one way or the other.

3 MR. LIMAN: Thank you, Your Honor.

4 THE COURT: Okay.

5 MS. CROZIER: Thank you, Your Honor.

6 And just for clarification, your ruling is with  
7 respect to the three Cook County tax refunds that --

8 THE COURT: Yeah.

9 MS. CROZIER: -- are the subject of our --

10 THE COURT: All the refunds. I mean, any refund  
11 that's made out to a debtor entity where Transform didn't  
12 buy the stock and is -- you know, unless Transform can show  
13 a right to cash the check, it shouldn't have gone into the  
14 cash management system. So that should be turned over.

15 MS. CROZIER: Thank you. Thank you very much.

16 MR. LIMAN: Your Honor, I can report that we have  
17 made progress with respect to the expert. I think both  
18 sides have submitted positions to the expert --

19 THE COURT: Okay.

20 MR. LIMAN: -- and submitted the -- Your Honor's  
21 transcripts, and I think that process --

22 THE COURT: Okay.

23 MR. LIMAN: -- is going smoothly.

24 THE COURT: I appreciate that. I have -- sometimes  
25 I get letters from people that I don't think are worth

1 filing on the docket, but I did want to ask about this  
2 issue.

3 I remember from maybe the July hearing, it may have  
4 been before then, that it was represented to me that the  
5 post-petition severance that was covered by the Transform  
6 deal had been paid. I've gotten correspondence that  
7 suggests otherwise. Could you look into that, both the  
8 debtors and Transform?

9 MR. LIMAN: Yes.

10 THE COURT: I was -- I think I was told that they  
11 did pay it.

12 MR. LIMAN: That's right, Your Honor. We believe  
13 that it was all paid --

14 THE COURT: Yeah.

15 MR. LIMAN: -- already. But --

16 THE COURT: And it may be that --

17 MR. LIMAN: -- if there is --

18 THE COURT: I mean, sometimes these letters are not  
19 clear, like maybe it was prepetition severance --

20 MR. LIMAN: Correct. It could -- that's possible.

21 THE COURT: -- which would be a claim, not a --

22 MR. LIMAN: Right.

23 THE COURT: -- not something that -- I don't -- I  
24 think not something Transform agreed to pay. I think it was  
25 the post-petition settlement.

1 MR. LIMAN: Certainly, Your Honor. And we can just  
2 coordinate --

3 THE COURT: But can you --

4 MR. LIMAN: -- with your chambers --

5 THE COURT: Could you --

6 MR. LIMAN: -- and get copies of whatever you got.

7 THE COURT: Well --

8 MR. LIMAN: I'm not sure we got them.

9 THE COURT: -- I don't -- it's just a general --

10 MR. LIMAN: Got it. That's fine.

11 THE COURT: I think -- what I suggest is that  
12 someone, either Transform or the debtors, file just a  
13 statement on the docket answering my question, which is --

14 MR. LIMAN: Yes.

15 THE COURT: -- has the post-petition severance that  
16 had been agreed to be paid by Transform been paid, and then,  
17 secondly, are there any post-petition severance claims -- I  
18 mean, just totally post-petition -- that have not been paid.  
19 I think it's a complete overlap under the APA. And I  
20 actually think it's not that big a number, but I would like  
21 to break it into those two categories.

22 MR. LIMAN: And, Your Honor, I'm sure it's clear,  
23 but I had not expected the question --

24 THE COURT: No. I --

25 MR. LIMAN: -- and not -- my silence is not --

1 THE COURT: Neither is Mr. Singh. I'm just --

2 MR. LIMAN: -- agreement except that we'll find out  
3 the answer.

4 MR. SINGH: We'll look into it, Judge.

5 THE COURT: I just want to get -- I just want to  
6 have that on the docket so that people can be pointed to it  
7 if they think they haven't been paid.

8 MR. SINGH: Certainly, Your Honor. We'll --

9 THE COURT: And it's just post-petition severance.

10 MR. SINGH: Understood.

11 MR. LIMAN: Thank you, Your Honor.

12 THE COURT: And when I'm saying that, what I mean  
13 is if someone was severed post-petition, not that they might  
14 be owed ongoing payments post-petition. But if someone was  
15 -- their job was terminated post-petition, that's what I  
16 mean by post-petition severance.

17 MR. SINGH: Right. No, understood.

18 THE COURT: Okay.

19 MR. SINGH: And, Your Honor, you said a week for  
20 the 20th. Should we just report back at a status conference  
21 on the 20th or --

22 THE COURT: Well, I think you should just submit an  
23 order.

24 MR. SINGH: I'm hopeful it will just be resolved.

25 THE COURT: I mean, I would think you would submit

1 an order. If --

2 MR. SINGH: Right.

3 THE COURT: -- there's a dispute, just put it on  
4 the calendar for the next omnibus date.

5 MR. SINGH: Okay. I think the next omnibus, Your  
6 Honor, is all the way at the end of January. I think if  
7 there's a way to just -- if there's a dispute --

8 THE COURT: Well, we'll see what -- I mean, it may  
9 be a very simple dispute, factual dispute, so --

10 MR. SINGH: Right.

11 THE COURT: -- I'm hoping the facts will be clear.

12 MR. SINGH: We'll report back on the 20th, Your  
13 Honor.

14 THE COURT: Yeah. It's not a legal issue. It's  
15 just --

16 MR. SINGH: Right.

17 MR. LIMAN: Thank you, Your Honor.

18 MR. SINGH: Thank you.

19 THE COURT: Thank you.

20 Okay. So I think the only other matter is the  
21 Sayville Menlo LLC versus Transform.

22 MR. DUBLIN: There's the -- we have the --

23 THE COURT: Oh, I'm sorry. The fourth plan  
24 supplement. Excuse me.

25 MR. DUBLIN: Yeah.

1 THE COURT: Correct.

2 MR. DUBLIN: Thank you, Your Honor. Phil Dublin,  
3 Akin Gump for the committee.

4 This issue relates to the compensation for the  
5 board members of the litigation trust in their capacity as  
6 litigation designees before then.

7 THE COURT: Right.

8 MR. DUBLIN: The debtors had filed the fourth  
9 supplement setting forth a proposed compensation on October  
10 7th. That was during the pendency of the confirmation  
11 process, before the confirmation order was entered. In an  
12 order to give people an opportunity to review that proposed  
13 compensation, there was a deadline -- an objection deadline  
14 made available to parties and we received one objection,  
15 some of Mr. Wander's clients.

16 There was also a joinder followed -- that followed  
17 that objection about two weeks after the objection deadline  
18 that went beyond the scope of the objection. I don't think  
19 anything -- the joinder in and of itself that joins with  
20 what Mr. Wander has asserted with respect to the contingent  
21 compensation will address that. With respect to the extra  
22 scope and who the board members are, that was all approved  
23 in connection with the confirmation order. We don't believe  
24 that is appropriate to be heard.

25 As the Court may recall, these -- the construct for



1 selection of the board members was part of the committee  
2 settlement that was embodied in the plan along with the  
3 assistance of Doug Chapman with respect to a limited  
4 mediation to resolve a number of the committee's objections  
5 to the plan in general.

6 Through that process it was agreed that there would  
7 be a five-member board, two selected by the debtors, two  
8 members selected by the debtors, three selected by the  
9 creditors' committee. The debtors, as previously designated  
10 in prior iterations of the plan, determined to designate  
11 Alan Carr and Bill Transier to the litigation trust board,  
12 two of the -- or the two independent members of the  
13 restructuring subcommittee who obviously had intimate  
14 familiarity with the claims and causes of action that have  
15 been asserted initially in the complaint filed by the  
16 restructuring subcommittee and, thereafter, by the  
17 litigation designees as amended to include 23 additional  
18 causes of action and 26 additional defendants. And that was  
19 put on file on November 25th.

20 The creditors' committee's designees, Ray Wallender  
21 (ph), Gene Davis and Patrick Bartels (ph), none of them had  
22 any involvement or prior experience with the debtors'  
23 Chapter 11 cases prior to being designated by the creditors'  
24 committee. All five of the designees obviously have  
25 significant restructuring related experience, have served on

1 independent boards and in roles of litigation trust board  
2 members or litigation trustees themselves in the past.

3 After determining the composition of the board, the  
4 debtors -- by the debtors and the creditors' committee, the  
5 creditors' committee itself and its advisors took the lead  
6 in negotiating the compensation structure with the board  
7 members and with two primary goals in mind.

8 The first was ensuring that there would be a  
9 reasonable base compensation for the significant amount of  
10 work that would go into the role to be played by the board  
11 members, as well as an incentive compensation component to -  
12 - which is common, in order to align the interests of the  
13 board members with the beneficiaries of those causes of  
14 action, the creditors of the debtors' estates.

15 Again, that -- the compensation structure was  
16 disclosed on October 7th and provides for an \$80,000 per  
17 year annual base compensation for each of the board members.  
18 That has not been opposed by Mr. Wander's clients or in the  
19 joinder. And then there's the contingent compensation  
20 structure which provides that after \$150 million in gross  
21 proceeds have been recovered, \$150 million online with the  
22 projected administrative expenses, then there would be  
23 incentive compensation that would be shared among the board  
24 members.

25 It would be one and a half percent of the gross

1 proceeds greater than 150 million up to 250 million; two  
2 percent of the gross proceeds greater than 250 million up to  
3 350 million; two and a half percent of gross proceeds  
4 greater than 350 million to 450 million; and then three  
5 percent after \$450 million of gross litigation proceeds.

6 Something to note just with respect to the proceeds  
7 in and of themselves, there's a bit of a bifurcation with  
8 respect to the receipt of the -- or the incentive  
9 compensation in that the gross litigation related proceeds,  
10 if anything comes in pre-effective date from preference  
11 actions, that will not be entitled to any -- will not be  
12 accounted for in connection with the incentive compensation  
13 because pre-effective date, the mandate for the litigation  
14 designees is focused on the defined term, specified causes  
15 of action, which is the -- we'll call them the ESL claim.  
16 There's obviously a lot more people involved and different  
17 entities involved in the litigation. But the mandate is  
18 smaller pre-effective date than post-effective date. So  
19 when preference proceeds come in pre-effective date, there's  
20 no -- that doesn't account towards the incentive  
21 compensation.

22 And at no point in time does the proceeds that come  
23 in from monetization of other assets the debtors have, for  
24 example, if money comes in from the Transform disputes and  
25 the like, that is not accounted for and is not added to or

1 included in the incentive compensation formula.

2 It's important to note that in connection with the  
3 negotiations that were had in leading to the ultimate  
4 compensation structure, it was taken into account the  
5 extensive or the more expansive role that these board  
6 members are going to have than you would typically see in a  
7 liquidating trust or litigation trust. The trust agreement  
8 was drafted in a manner by the debtors and the committee to  
9 ensure that these board members, given the significance that  
10 these causes of action will have to creditor recoveries will  
11 have a much more hands on approach.

12 It's not handing over to a litigation trustee the  
13 role of stewarding these causes of action. The board  
14 members are doing it themselves. To the extent that  
15 ultimately a trustee is selected to facilitate the operation  
16 of the trust, it's going to be an administrative function.  
17 It is not going to be a substantive role that you often see  
18 in similar circumstances where you have a board that's just  
19 rubber stamping or getting a presentation from a trustee and  
20 then saying, this works. These board members are actively  
21 involved in the process on a regular basis and obviously  
22 signed off on the amended adversary complaint that was filed  
23 on the 25th.

24 In fact, the role that these board members are  
25 playing is more akin to what you would see of a Chapter 11

1 trustee or of a Chapter 7 trustee, but for with respect to a  
2 Chapter 7 trustee nowhere near the type of compensation that  
3 a  
4 Chapter 7 trustee may be able to obtain.

5 As noted in the debtors' disclosure statement, they  
6 included projections of what a Chapter 7 trustee would  
7 receive in the event the cases were converted and the plan  
8 was not confirmed. The debtors estimated in the disclosure  
9 statement \$236 million in distributable proceeds from a  
10 conversion of the case to Chapter 7, and that would include  
11 proceeds with respect to the primary adversary proceeding.

12 While the creditors' committee obviously believes  
13 that, and the litigation designees believe now that a  
14 substantially greater value will come in, using that  
15 disclosure statement analysis as a baseline, in that  
16 circumstance a Chapter 7 trustee would have received about  
17 \$7 million in contingent fees, whereas here because the  
18 contingent fee program doesn't kick in until \$150 million  
19 have been collected, assuming that the 236 minus the 150,  
20 the \$86 million was all litigation proceeds entitled to  
21 compensation, that would only be \$1.29 million that would go  
22 to the board members here.

23 It's not until there's in excess of \$450 million of  
24 litigation proceeds that you would get to the three percent  
25 threshold. At that point in time, again, assuming that all

1 \$450 million in the Chapter 7 context were proceeds akin to  
2 what the board members would be entitled to receive, the  
3 board members would receive about half, less than half of  
4 what -- actually, it's even less. It's about a third, well,  
5 it's about a half of what the Chapter 7 trustee would  
6 receive -- oh, I'm sorry. It's about half of that.

7 So it's clear to us just based on a straight  
8 comparison of what would happen in a Chapter 7 case that the  
9 board member compensation here is reasonable. The objection  
10 without any support just asserts that the fees are excessive  
11 and unwarranted. We don't -- it's just untenable to believe  
12 that based on the analysis contained in the reply or just an  
13 assessment of looking at the disclosure statement and the  
14 fee structure that's been proposed by the debtors and the  
15 committee with respect to the board members.

16 The other issue that was raised in --

17 THE COURT: Can I interrupt you on that?

18 MR. DUBLIN: Sure.

19 THE COURT: What was the -- was the -- did the  
20 committee deliberate on this as a whole? Was there -- how  
21 was the decision made?

22 MR. DUBLIN: As a whole, Your Honor. We had  
23 multiple meetings where this was discussed. We had Sunday  
24 evening conference calls with the committee co-chair in  
25 advance of a number of those meetings as the terms were

1 being negotiated, and ultimately the entirety of the  
2 committee unanimously approved the fee structure.

3 THE COURT: Okay.

4 MR. DUBLIN: Just -- the other point I was about to  
5 add was that in the joinder there was some insinuation about  
6 conflicts between the debtors and the committee on the one  
7 hand and the board members on the other. Obviously, we  
8 disagree with that assessment. But we did include as an  
9 exhibit to the reply a 2014 like disclosure from Akin Gump  
10 with respect to connections to each of the board members and  
11 the current or former connections with respect to all five.

12 I would note that there were three matters that  
13 were undisclosed for confidentiality reasons.

14 THE COURT: Okay.

15 MR. DUBLIN: And with that I'll -- unless Your  
16 Honor has additional questions, I'll turn it over to Mr.  
17 Wander.

18 THE COURT: Okay.

19 MR. WANDER: Good afternoon, Your Honor.

20 THE COURT: Good afternoon.

21 MR. WANDER: David Wander of Davidoff Hutcher &  
22 Citron. I rise on behalf of my clients, Orient Craft, Eric  
23 Jay and Stolaas Company.

24 Your Honor, on July 26th, the debtor filed a notice  
25 of filing of plan supplement in connection with the modified

1 second amended joint plan, and that's Docket Number 4632.

2 At that time there was no trust agreement and no information  
3 about the five-member board.

4 THE COURT: Well, the board itself had been  
5 identified on June 28th, and that's in the disclosure  
6 statement.

7 MR. WANDER: Okay. Going by this document I  
8 appreciate what Your Honor just said.

9 On August 2nd, the debtor filed a notice of filing  
10 plan supplement in connection with the modified second  
11 amended plan. That's Document 4703. That included the  
12 liquidating trust that had an Annex A that listed the five  
13 members. All it said was for Mr. Bartels, for example,  
14 creditors' committee member, for Mr. Carr, debtors' member.  
15 That was the full disclosure of those people in that  
16 document.

17 Annex B, which is the compensation, had blanks for  
18 the base compensation and the incentive compensation.

19 On October 1, which is two days before the  
20 confirmation hearing, the debtor filed Docket 5295, notice  
21 of filing of revised plan supplement in connection with the  
22 modified second amended joint plan. That had an Annex B on  
23 page 58 and it also had the compensation, the base  
24 compensation as a blank and the incentive compensation as a  
25 blank,



1           There was a footnote, though, actually, a footnote  
2     on -- starting on the document filed on August 2nd at Annex  
3     B. Note 5 said, note to draft, the annual base compensation  
4     of each member of the liquidating trust board shall be  
5     disclosed prior to the confirmation hearing.

6           And Note 6 said, note to draft, each member of the  
7     liquidating trust board shall be entitled to incentive  
8     compensation on terms to be determined. Such terms to be  
9     disclosed prior to the confirmation hearing. That was on  
10    that August 2nd filing.

11          And the same footnote was included on the August 1  
12    filing which said that the compensation for both the base  
13    compensation and the incentive would be disclosed prior to  
14    the confirmation hearing.

15          Now at the confirmation hearing when I -- well, by  
16    the time of the confirmation there was no disclosure with  
17    regard to the compensation. And when I cross-examined the  
18    debtors' witnesses, including the people who are going to be  
19    the debtors' representatives on the liquidating trust board,  
20    they said they had no personal knowledge at all regarding  
21    the compensation.

22          It was not until the adjourned hearing on October  
23    7th, shortly before that, that Document 5335 was filed with  
24    the Court. And that was the notice of filing of the fourth  
25    plan supplement in connection with the modified second

1 amended joint plan that listed the base compensation of  
2 \$80,000 of each litigation designee who are also the  
3 litigation -- liquidating trust board members. It also then  
4 set forth the contingent compensation.

5 I filed an objection to the contingent  
6 compensation. And, by the way, at the time that the October  
7 7th filing was made, there was no additional information  
8 about the members and any connections that they had.

9 THE COURT: There's no need to.

10 MR. WANDER: I -- okay.

11 THE COURT: They had been disclosed for months.  
12 Two of them had been the debtors' independent director since  
13 before the case.

14 MR. WANDER: No. I'm -- I understand.

15 THE COURT: I think the --

16 MR. WANDER: The other --

17 THE COURT: -- other peoples' names are well  
18 recognized in the bankruptcy community and, if they weren't,  
19 people could have gone online and figured out who they were.

20 MR. WANDER: Okay. So I filed an objection just to  
21 the contingency contingent compensation. And based upon  
22 what had been disclosed and what had not been disclosed, I  
23 said it appeared to me the compensation was excessive and  
24 unwarranted, and there should be full disclosure of the  
25 process for determining the criteria and the amount of the

1 contingent compensation, the identifies of the people  
2 involved in the process, and the role they played.

3 And I pointed out in the objection at paragraph 6,  
4 I said, the record before the Court on this issue is bare.  
5 At the confirmation hearing there was no testimony or other  
6 evidence --

7 THE COURT: All right. But there was an objection  
8 deadline after that and you filed a timely objection.

9 MR. WANDER: Right.

10 THE COURT: So that -- now we're here on it. So --

11 MR. WANDER: Right.

12 THE COURT: -- what is the problem with the  
13 compensation?

14 MR. WANDER: Well, Your Honor -- and, again, I  
15 filed the objection on October 25th. I'm the moving party -  
16 -

17 THE COURT: Right.

18 MR. WANDER: -- in this matter.

19 THE COURT: Right.

20 MR. WANDER: Okay. I did not get -- we did not get  
21 any response --

22 THE COURT: What -- no. You said it -- in what  
23 sense is the compensation as you described it excessive and  
24 unwarranted? In what sense?

25 MR. WANDER: I'll tell you, Your Honor.

1           So the \$80,000 base compensation -- and excuse me  
2           for a second just to get to my notes.

3           (Pause)

4           MR. WANDER: The reason for the incentive  
5           compensation is so the board members will be engaged and  
6           active, and their interests will be aligned with the  
7           beneficiaries. That's the reason that they're supposed to  
8           get the additional compensation. That term, engaged and  
9           active, is peppered throughout the response by the debtors  
10          and the committee.

11          Now what I don't understand is what's the  
12          difference in their engagement when they're getting base  
13          compensation of \$80,000 a year and what then is elevated in  
14          their engagement if they get contingent compensation because  
15          the \$80,000 a year, and I believe this liquidating trust may  
16          go on for ten years for getting claims objections -- in  
17          other liquidating trusts that I've been involved in  
18          (indiscernible), it's been more than ten years. Over ten  
19          years if you're getting \$80,000 a year, it's \$800,000. And,  
20          collectively, the five board members will get \$4 million in  
21          base compensation.

22          Now some of them, actually all three of the  
23          committee's members are on various other boards that the  
24          committee represents them, either liquidating trusts or just  
25          board members of corporations. So it doesn't appear that

1 this is a full-time or needs to be a full-time job.

2 THE COURT: Neither is being a Chapter 7 trustee  
3 and yet congress saw fit to compensate Chapter 7 trustees in  
4 a sliding scale manner.

5 MR. WANDER: I understand. But these people are  
6 not the Chapter 11 trustees. And so --

7 THE COURT: I'm sorry. That -- I think that's  
8 maybe the fundamental disconnect here. This is not a board  
9 that oversees the activities of a litigation trustee. These  
10 are the trustees. There's no -- they are not a board in the  
11 sense of a board of directors where, you know, a much lower  
12 amount of compensation would be warranted, and instead of  
13 compensation would be a totally different structure.

14 These are the trustees.

15 MR. WANDER: Right.

16 THE COURT: And they're being paid the incentive  
17 compensation in the aggregate. So --

18 MR. WANDER: Right. So if the -- if there's  
19 tremendous success on the ESL litigation, which would be  
20 based upon, I submit, the activity of Akin, the counsel, why  
21 should these people get \$9 million?

22 THE COURT: Why should a Chapter 7 trustee get  
23 compensation when the litigation is based on the activity of  
24 his or her counsel? It's because it's warranted. Congress  
25 has already decided that.

1 Do you have any evidence to show that actual  
2 litigation, post-litigation trusts -- trustees, excuse me,  
3 for a liquidation trustee -- because that's how I view these  
4 people, not as the board members, but they are, in effect,  
5 the trustees, that this compensation is out of line with  
6 what's done in similar cases with similar litigation?

7 MR. WANDER: Well, Your Honor, I submit you have  
8 to take the overall context of this case.

9 THE COURT: I've just asked you that question.  
10 That's why -- in the overall context of this case, where  
11 there is a substantial amount of post-confirmation, post-  
12 effective date litigation, and so there's a trust set up to  
13 pursue it, is this compensation structure out of line with  
14 other examples in a similar context, where substantial  
15 litigation is pursued?

16 So, for example, Lionel (ph), is it out of line for  
17 the liquidation -- for the litigation or the liquidation  
18 trustee?

19 MR. WANDER: Your Honor, I don't know if it's out  
20 of line for that case.

21 I believe it's out of line for this case under the  
22 facts of this case.

23 THE COURT: Why.

24 MR. WANDER: Well, Your Honor, we've already spent  
25 in connection with the litigation, okay, I was told that it

1 was about \$20 million when the committee first did their  
2 investigation and they had a draft complaint attached to  
3 their pleadings.

4 We were told by, in round numbers, Paul Weisman  
5 approximately \$20 million in order to file that complaint  
6 and we now have the additional legal services in millions of  
7 dollars, presumably, that went into the filing of now this  
8 amended complaint.

9 I just submit at a certain point in time the amount  
10 of money that's being expended not for the creditors but for  
11 the people who are doing the litigation, one on top of the  
12 other.

13 THE COURT: I'm sorry. I -- you'd have to explain  
14 that to me. You think that there's no basis to pursue the  
15 litigation?

16 MR. WANDER: No. I do. Is it --

17 THE COURT: So is it really then just for the  
18 benefit of the people that are actually pursuing it?

19 MR. WANDER: But --

20 THE COURT: As opposed to the lawyers?

21 MR. WANDER: Your Honor --

22 THE COURT: Mr. Wander, you've got to be careful  
23 in how you phrase these things. I mean, honestly, that's  
24 just --

25 MR. WANDER: Well, I assume Akin Gump is going to be

1 pursuing the litigation in their best fiduciary duties.

2 THE COURT: But they're the lawyers.

3 MR. WANDER: I understand that.

4 THE COURT: So, I -- again --

5 MR. WANDER: And these professional trustees --

6 THE COURT: See --

7 MR. WANDER: -- if they're getting the base  
8 compensation, why isn't that enough? If we're paying --

9 THE COURT: I go back to -- I accept that this is  
10 market driven. If you can get competent, capable people to  
11 manage the litigation for less, because that's how the  
12 market works, I understand the objection.

13 But if you're just saying it's too much because  
14 they should be working for less, they don't have to and I  
15 don't want to have a trust that's run by the lawyers.

16 MR. WANDER: No, Your Honor --

17 THE COURT: I want a trust that's run by a  
18 trustee.

19 MR. WANDER: And I'm saying why are -- what I  
20 don't understand is why they need incentive compensation to  
21 be active and engaged when the --

22 THE COURT: I see -- all right. I know you don't  
23 understand that. But it's incumbent upon you to explain to  
24 me why, based on some form of market, if they litigation  
25 trustee in Lionel or any number of other cases, is being



1 compensated based on an \$80,000 a year fixed compensation, I  
2 would understand your point.

3 I don't believe that is the case. But if that is  
4 something you can show me, I accept your argument.

5 MR. WANDER: Your Honor --

6 THE COURT: But just to say you could work for  
7 80,000 and that's fine, I suppose you probably could get  
8 someone that would work for 80,000 a year and be the client.

9 The question is whether anyone would want them to  
10 be the client and be making the settlement decisions and  
11 litigation decisions that would have to be made.

12 MR. WANDER: Your Honor, when it came out the  
13 connections of the firm that is now pursuing these people  
14 and the compensation -- I'm just going by what was disclosed  
15 two days ago. Yes, their names may have been out there but  
16 it wasn't disclosed the connections between, for example,  
17 Mr. Davis and Akin Gump. There are 21 former matters that  
18 they were involved in together and three current matters.

19 Now I'm not sure what a conflict of interest is but  
20 we just have had the disclosure because the other joinder  
21 winners --

22 THE COURT: What is the legal --

23 MR. WANDER: -- said there should be --

24 THE COURT: What is the legal basis for this  
25 argument?

1 MR. WANDER: Well, Your Honor --

2 THE COURT: What section of the Bankruptcy Code  
3 governs this argument?

4 MR. WANDER: I don't think -- I think it goes to  
5 the integrity of the process if we just found out two days  
6 ago, okay?

7 THE COURT: Right.

8 MR. WANDER: That Mr. Davis has had 21 -- it's the  
9 basic disclosure of conflict of interest and connections  
10 between the professionals and the other people --

11 THE COURT: There is a -- just to answer the  
12 question you were unable to answer. I believe the  
13 applicable sections of the Bankruptcy Code are 330, 327  
14 which apply to the lawyers, not to the board members. What  
15 applies to the board members is 1129(a)(4) and (a)(5).

16 And I don't think what you have alleged here is  
17 anything close to running afoul of (a)(4) or (a)(5).

18 As far as 330, that's going to come up on their  
19 next fee application.

20 But the fact that someone has served on a lot of  
21 boards and liquidation trusts that professionals haven't  
22 been involved in is not a conflict of interest.

23 There are not many people that take this work on.  
24 It's not risk free.

25 MR. WANDER: Your Honor, I submit there would be a

1 lot of people and professionals in the bankruptcy community  
2 who would take this work on.

3 THE COURT: Well, you're just wrong on that.  
4 People are not raising their hands to do this work. It's  
5 hard to find people to do this.

6 Look at the people that resigned from PG&E's board  
7 who are restructuring advisors. You know?

8 MR. WANDER: You --

9 THE COURT: Look at the lawsuit against counsel  
10 and others in Lionel for what, \$350 million. This is a  
11 specialty.

12 MR. WANDER: Well, Your Honor, the fact that it's  
13 a specialty when you have the same people with the same law  
14 firm, it creates what I submit is an inherent conflict of  
15 interest when it's the same people --

16 THE COURT: How? How? Where's the conflict?

17 MR. WANDER: Well, let's say Akin makes a mistake  
18 in the litigation. I doubt the liquidating trust board  
19 members are going to really raise that issue. They're  
20 serving on several boards together.

21 If the board members -- and I'm just saying this  
22 hypothetically, weren't as actively and engaged as they  
23 should be because they're on so many boards, I doubt Akin's  
24 going to be complaining because they're all serving on the  
25 same -- in the same roles together.

1 I mean, it's -- it looks like a boys' club here of  
2 the same law firm hires the same people to serve on the  
3 boards. The people on the boards hire the same law firm.  
4 And the irony that I found when I was preparing for today is  
5 I then pulled out the --

6 THE COURT: Can I interrupt? Again, this -- as  
7 far as the people on the board are concerned, that was  
8 disclosed in June.

9 MR. WANDER: But not the connections.

10 THE COURT: But -- there's -- it's -- you -- look,  
11 it's an 1129 issue except for the compensation which is  
12 subject to subsequent approval by the Court. This issue has  
13 gone by the boards. The plan was confirmed. There's an  
14 order confirming the plan that includes the identification  
15 of these people which includes the conflict issue.

16 MR. WANDER: It -- what was disclosed two days  
17 ago, was not --

18 THE COURT: You know what? Too late. 1129(a)(5)  
19 says the Court shall confirm a plan only if all of the  
20 following requirements are met. And (a)(5) says the  
21 proponent of the plan has disclosed the identity and  
22 affiliation of any individual proposed to serve after  
23 confirmation of the plan as a director or officer or a  
24 voting trustee of the debtor. An affiliate of the debtor  
25 participating in a joint plan with the debtor or a successor

1 of the debtor under the plan and the appointment to or  
2 continuance in such office and such individual is consistent  
3 with the interests of creditors and equity security holders  
4 and with public policy.

5 MR. WANDER: Yes. But --

6 THE COURT: Yes.

7 MR. WANDER: I --

8 THE COURT: And I've already so found and that  
9 order is a final order.

10 MR. WANDER: Right. But --

11 THE COURT: So we're done on this point.

12 MR. WANDER: Okay, Your Honor.

13 THE COURT: So you may have a 330 issue that you  
14 can raise. But, frankly, you're going to have to say a lot  
15 more than you've said today because, right now, it's empty.

16 MR. WANDER: Thank you, Your Honor.

17 THE COURT: Again, I -- it's just not enough to say  
18 it's not enough. I mean -- I'm sorry. It's not enough to  
19 say it's too excessive. You've got to give me a reason and  
20 just saying that there's someone out there who will do it  
21 for less, isn't enough.

22 You haven't identified this someone. You haven't  
23 shown me any market information to show what this normally  
24 costs. It's just --

25 MR. WANDER: Your Honor, the disclosure was

1 supposed to -- the compensation was supposed to be --

2 THE COURT: No. In fact --

3 MR. WANDER: -- by the confirmation --

4 THE COURT: -- under the plan, under the plan  
5 itself, to confirm the plan, this is 1129(a)(4). It helps  
6 to actually cite the statute in an objection and be aware of  
7 the applicable provisions. 1129(a)(4) says the court shall  
8 confirm a plan only if all of the following requirements are  
9 met; (a)(4) any payment made or to be made by the proponent,  
10 by the debtor or by a person issuing securities requiring  
11 property under the plan, for services or for costs and  
12 expenses or in connection with the case or in connection  
13 with the plan and incident to the case, has been approved by  
14 or is subject to the approval of the court as reasonable.

15 So, again, that's why we're here.

16 MR. WANDER: And my point was that they didn't  
17 disclose it prior to the confirmation --

18 THE COURT: And I've now found it's reasonable.

19 MR. WANDER: I -- and at the time, when I filed the  
20 objection, that's all we knew.

21 THE COURT: But you have to -- I appreciate it but  
22 I would think by now you would have something more than just  
23 telling me that \$80,000 is enough.

24 MR. WANDER: Well, Judge, we -- I only got a  
25 response two days ago.

1 THE COURT: But you've had the -- you've had the  
2 compensation structure since October 7th. That's plenty of  
3 time to go on Pacer and see what the compensation structure  
4 is in any number of comparable litigation liquidation  
5 trusts.

6 I just -- you know, it's a -- an active committee,  
7 made up of sophisticated people who know that their only  
8 recovery is going to come from this litigation.

9 I can, I thin, reasonably infer that the reason it  
10 took so long to come up with a compensation structure is  
11 because it was a difficult issue for them to deal with.

12 They eventually agreed on it based on the full  
13 participation of the committee and the committee vote.

14 MR. WANDER: Well --

15 THE COURT: That's what I've been told.

16 MR. WANDER: -- at the confirmation --

17 THE COURT: By counsel for the committee.

18 MR. WANDER: At the confirmation hearing --

19 THE COURT: That's not what -- we're not here on  
20 that. This is not a confirmation issue.

21 MR. WANDER: I -- no. I was only talking about  
22 the testimony. I was only talking about the testimony --

23 THE COURT: Right.

24 MR. WANDER: -- of the people whose -- who are on  
25 the board who said they had no knowledge of anything --

1 THE COURT: This isn't a board issue. This was  
2 decided by the creditors' committee because that's who these  
3 people are going to be working for; the unsecured creditors.  
4 They're the ones that set the compensation.

5 It's the creditors' committee. It's their money.

6 In fact, if it was the debtors' board, I'd be more  
7 worried about maybe there might be some, you know -- it's  
8 not their money. So maybe they would lay down and agree to  
9 it, an excessive compensation.

10 But the people on the committee themselves are owed  
11 substantial amounts of money and they're fiduciaries for  
12 people who are owed lots of money.

13 And they are not going to lay down.

14 MR. WANDER: And I -- well, and, Your Honor, like  
15 I said, two days ago we got the disclosure of the  
16 connections.

17 THE COURT: And that's irrelevant. It's  
18 irrelevant in the next fee application because that's the  
19 only place it applies under 330. It -- I've already decided  
20 that issue, for better or worse, because it was disclosed in  
21 June 28, months before the confirmation hearing.

22 People could have raised the issue then. They  
23 could have asked about it then. They waited until  
24 confirmation was over.

25 But, if anything, as far as the board is concerned,



1 a confirmation issue and it's already embodied in a final  
2 order which is the confirmation order.

3 MR. WANDER: I understand. And when I saw the  
4 base compensation, which I had no objection to, I didn't  
5 understand why these professionals, who would have fiduciary  
6 duties needed to be incentivized to do what everyone was  
7 already doing in pursuing the litigation.

8 THE COURT: Okay. Well, it is not a good thing to  
9 have a lawyer without a client. So, yes. There's great  
10 incentive for the lawyers to do a good job. But you need a  
11 client.

12 MR. WANDER: And they are the client and they were  
13 -- they are in place with the \$80,000. And --

14 THE COURT: All right. We're plowing over old  
15 ground at this point.

16 MR. WANDER: I'll move on, Your Honor. Thank you.

17 THE COURT: I conclude, based on this record, that  
18 the compensation structure is, in fact, reasonable and  
19 consistent with 1129(a)(4). I approve it.

20 MR. WANDER: Your Honor, while I'm up one other  
21 thing just to -- a scheduling matter that I had raised and  
22 this gets to the World Imports and the hearing that we  
23 thought we were going to have today.

24 And had we had it, I submit it would be making the  
25 consent program and the resolution of a legal issue much

1 easier.

2 It's now adjourned to January 28th. We've been  
3 waiting for the debtor to file its reply papers.

4 I would request that a date be fixed and so that we  
5 can prepare for oral argument. The January --

6 THE COURT: Well, the issue, I think is we. I  
7 think there needs to be some thought given. There are a lot  
8 of people that have this issue. It's not just you and your  
9 client.

10 MR. WANDER: And all the people who have filed the  
11 papers are -- and those who haven't, like PACO (ph), who I  
12 believe is the name, represented by Morris and Foster, even  
13 though there was an objection to their claim, which is over  
14 \$5 million, I believe; they filed supporting papers because  
15 their rights are going to be decided even though there  
16 wasn't a claim objection.

17 So the people who have the issue, and it's -- and  
18 the skin in the game, they want to move forward and get a  
19 ruling from --

20 THE COURT: Well, I want to make sure --

21 MR. WANDER: -- Your Honor.

22 THE COURT: -- of that. I think January 28th is  
23 probably a good date. But I just want to make sure that the  
24 people who would be arguing that issue on the claimant's  
25 side will be able to do it then. That's all.

1 MR. WANDER: And we will be ready. We just --

2 THE COURT: I know you will be.

3 MR. WANDER: No. The others, too.

4 THE COURT: Okay.

5 MR. WANDER: The others, too.

6 THE COURT: Well --

7 MR. WANDER: We've spoken. We've -- they've also  
8 submitted, made submissions to Your Honor.

9 We just want the debtor, who has now had about two  
10 months, since we filed our briefs, we'd just the debtor to  
11 file their papers and we'd just --

12 THE COURT: Okay.

13 MR. WANDER: -- like to have a date and not have  
14 it adjourned again.

15 THE COURT: Okay.

16 MR. WANDER: It's just not fair that they can have  
17 two months, three months, to their reply. Let's get it  
18 filed.

19 THE COURT: Okay.

20 MR. WANDER: If they could just give us a date.

21 THE COURT: Do you have something on --

22 MR. MILLER: I was just going to say we represent  
23 quite a few --

24 Jonathan Miller from Sarachek law firm. We  
25 represent about a half a dozen people in -- on this issue.

1 And we also filed a supporting document on this.

2 THE COURT: All right. So on the claimant side, it  
3 does look like people will be ready to argue on the 28th?

4 MR. MILLER: Yes.

5 THE COURT: Okay.

6 MR. SINGH: Well, Your Honor, Sunny Singh.

7 Part of the issue is we just talked about how we're  
8 going to try to settle the World Imports issue.

9 THE COURT: Yeah.

10 MR. SINGH: We're taking that into account into  
11 scheduling.

12 These folks, if they're not going to settle, and  
13 they want to get on with the litigation, we'll get on with  
14 the litigation.

15 THE COURT: No. That's fine.

16 MR. SINGH: In due course.

17 THE COURT: I think that --

18 MR. SINGH: If Your Honor rules --

19 THE COURT: I think that as far as the settling of  
20 this, I think as long as you have your brief in ten days  
21 before the hearing; that's fine.

22 MR. SINGH: Thank you.

23 THE COURT: That will give you time to settle it.

24 I was thinking of a small window for the opt-ins to  
25 settle.

1 MR. SINGH: Yeah. Your Honor, it's not -- we're  
2 holding anything back on the reply. That's not -- that I  
3 think is perfectly fine.

4 THE COURT: All right. Okay.

5 MR. SINGH: The issue was we didn't want a ruling  
6 because then there's no settlements to --

7 THE COURT: No. But the settlement was just -- the  
8 settlement was for the opt-ins.

9 MR. SINGH: Yeah. No. I understand.

10 THE COURT: And that'll be before the 28th.

11 MR. SINGH: Yeah. I think now that we have clarity  
12 on timing --

13 THE COURT: Okay.

14 MR. SINGH: -- I don't think that --

15 THE COURT: So pick a day. Ten days, two weeks? I  
16 don't -- before the hearing?

17 MR. SINGH: Two weeks for the reply?

18 THE COURT: Yeah. Okay?

19 MR. SINGH: I think that's like eight days more  
20 than normal. That's fine.

21 MR. WANDER: Well, it's already been two months.

22 MR. SINGH: That's fine. Right. But we haven't  
23 focused on --

24 MR. WANDER: Okay.

25 MR. SINGH: -- that. We're focusing on the

1 reconciliation.

2 MR. WANDER: Okay.

3 MR. SINGH: Two weeks before is fine, Your Honor.

4 THE COURT: Okay.

5 MR. SINGH: Thank you, Judge.

6 THE COURT: And then five days for any response.

7 MR. SINGH: Well, actually that's not. Can we do  
8 one week. Can we do one week before -- I know there are  
9 people that are writing briefs are not available.

10 MR. WANDER: This is not --

11 MR. SINGH: They're not going (indiscernible).

12 MR. WANDER: -- (indiscernible) this would be --

13 MR. SINGH: Sorry, Your Honor.

14 MR. WANDER: This would be the last set of papers.

15 THE COURT: So there's no reply by --

16 MR. SINGH: No, no.

17 MR. WANDER: This would be their reply.

18 THE COURT: Oh, all right.

19 MR. SINGH: It's a reply because it's always due  
20 like two days before --

21 THE COURT: All right. So let's --

22 MR. SINGH: -- the hearing. I --

23 THE COURT: No. So this is just a reply? This is  
24 not the objection to the motion? Okay. That will be a  
25 week.

1 MR. SINGH: Yeah.

2 THE COURT: Okay. A week before the hearing.

3 That's fine.

4 MR. SINGH: Right. Thank you.

5 THE COURT: A week before the hearing.

6 MR. WANDER: That's fine.

7 THE COURT: Yeah.

8 MR. WANDER: Thank you.

9 THE COURT: Okay. For some reason I thought this  
10 was the objection.

11 MR. WANDER: No, no.

12 MR. SINGH: The objection is on file. So --

13 THE COURT: So your motion --

14 MR. SINGH: -- there were a number of  
15 objections --

16 THE COURT: So you're responding to an objection.

17 MR. WANDER: No, no. We've responded to --

18 THE COURT: To their objection?

19 MR. WANDER: Right.

20 THE COURT: All right.

21 MR. WANDER: And now we're waiting for the reply.

22 THE COURT: So a week before is fine.

23 MR. SINGH: And there's also another issue where  
24 he's found more clients, him and some others are like  
25 finding clients that have already been disallowed. There's

1 those motions --

2 THE COURT: No. But this is just the --

3 MR. SINGH: -- are separate.

4 THE COURT: -- World Imports point, right?

5 MR. WANDER: Yes.

6 THE COURT: Okay. All right.

7 MR. SINGH: Thank you.

8 THE COURT: That's fine.

9 MR. SINGH: Brian is out until the 14th so like you  
10 know --

11 THE COURT: Okay.

12 MR. SINGH: -- so that's really not --

13 THE COURT: So I think we've -- I mean, as far as  
14 the joinder is concerned, the joinder (a) was untimely, (b)  
15 it's just joinder, which means I let someone speak in  
16 support of the underlying objection but there are not rights  
17 to appeal, there are no rights to settle and there are no  
18 rights to add new issues in respect to a joinder and, beyond  
19 that, an untimely joinder.

20 So I dealt with Mr. Wander's arguments and unless  
21 the person who joined in has market data to give me, my  
22 ruling stands.

23 Okay. So then the last matter on the calendar I  
24 think is the matter I prematurely called which is the --

25 MR. SINGH: Your Honor, may I be excused, please?



1 THE COURT: Yes.

2 MR. SINGH: Thank you.

3 THE COURT: The Sayville Menlo LLC versus  
4 Transform.

5 UNIDENTIFIED SPEAKER: Your Honor, if it's okay  
6 (indiscernible).

7 THE COURT: Yes, certainly.

8 UNIDENTIFIED SPEAKER: Thank you.

9 (Pause)

10 UNIDENTIFIED SPEAKER: Is Your Honor -- I'm sorry.  
11 Is Your Honor (indiscernible) first matter that we dealt  
12 with?

13 THE COURT: Some time later, after lunch, I will.  
14 Yeah.

15 UNIDENTIFIED SPEAKER: (Indiscernible) redirect?

16 THE COURT: Well, this is going to be going for a  
17 while. And then I'm going to go to lunch. So you may want  
18 to come back. You may want to have lunch.

19 UNIDENTIFIED SPEAKER: Or I might see you on the  
20 court plaza.

21 THE COURT: That's fine, too.

22 UNIDENTIFIED SPEAKER: Would that be all right,  
23 Your Honor?

24 THE COURT: Certainly. Just request permission.  
25 That's fine.

1 (Pause)

2 UNIDENTIFIED SPEAKER: Your Honor, when do you  
3 expect to return from lunch? Approximately?

4 THE COURT: I don't know. This may take an hour.  
5 So I may not get back here until two thirty, easily. Maybe  
6 later than that. Maybe three.

7 (Pause)

8 MR. BAREFOOT: Good afternoon, Your Honor. For the  
9 record, Luke Barefoot from Cleary Gottlieb Steen & Hamilton,  
10 LLP for Transform Holco, LLC and its affiliates here on the  
11 final agenda item, the Sayville Menlo LLC amended complaint  
12 and the motion to dismiss filed by our client.

13 Just at the outset, Your Honor, I'm sure you're  
14 pleased to note that I'm not here on a lease assumption and  
15 assignment matter and I can report that we have actually  
16 completed the very last of the pending motions to assume and  
17 assign leases. And there are less than a dozen remaining  
18 live cure disputes. One of which is the matter we're about  
19 to jump into.

20 THE COURT: Okay.

21 MR. BAREFOOT: Your Honor, I'll move right into  
22 the merits which have been fully briefed.

23 First off, the core issue is the meaning of this  
24 Court's bidding procedures order. And, as Your Honor knows,  
25 that set up a process whereby the debtors in advance of

1 making a decision, you assume or assign, would send out a  
2 notice that was approved, the form of which was approved by  
3 the Court and it would set out the cure amounts necessary to  
4 cure any defaults under Section 365(b).

5 There is no dispute here that the landlord was  
6 properly served with this assumption and assignment notice;  
7 that it required a response by January 26 and that no  
8 response was filed or served by the landlord.

9 The only dispute about the cure notice is whether  
10 it and the bidding procedures order required a response only  
11 as to monetary defaults, which is the post hac reading that  
12 the landlord now asserts or whether it required responses to  
13 any form of cure.

14 First off, Your Honor, as to the monetary defaults,  
15 which even under their reading of the cure notice, would  
16 have required a response by January 26th.

17 They do assert in proofs of claim that they filed  
18 against the estate in the State Court complaint that they  
19 sought to join Transform to and in both the amended and the  
20 original complaint monetary defaults.

21 They specifically assert monetary damages through  
22 various causes of action in each of Counts I through IV.

23 So, unless as we move on, Your Honor's inclined to  
24 hear their excusable neglect arguments, there really is no  
25 dispute that that form of relief falls away and is barred

1 even under their interpretation of the bidding procedures  
2 order.

3 Moving second to the non-monetary default question,  
4 Your Honor, I'd point the Court directly to paragraph 33 of  
5 the bidding procedures order.

6 Paragraph 33 says the cure costs set forth in the  
7 assumption and assignment notice shall be controlling and  
8 will be the only amount necessary to cure outstanding  
9 defaults under the applicable contract or lease under  
10 Bankruptcy Code 363(b); notwithstanding anything to the  
11 contrary in the contract or lease, or any other document,  
12 and the counterparty shall be forever barred from asserting  
13 any additional cure or other amounts with respect to such  
14 contract or lease against the debtors, the successful bidder  
15 or the property or of any of them.

16 Now, I would like to just highlight a few pieces of  
17 that that I think make it very difficult to read this  
18 provision of the bidding procedures order in a way that it  
19 only touches monetary defaults.

20 First off, it expressly references amounts to cure  
21 outstanding defaults under Bankruptcy Code 365(b). And, as  
22 the landlord's own authority has recognized, non-monetary  
23 defaults are not exempt from Section 365(b).

24 And, instead, the last clause of Section 365(b)  
25 unequivocally requires that for a non-residential real

1 property lease, such as this one, if there is a claimed  
2 default relating to failure to operate, that default must be  
3 cured by performance at and after the time of the  
4 assumption.

5 So the landlord's reading of this order, which  
6 references and incorporates the requirements of Section  
7 365(b), would put the order at odds with the terms of  
8 365(b).

9 THE COURT: Well, except I -- I appreciate that the  
10 last clause of paragraph 33 says shall be forever barred  
11 from asserting any additional cure or other amounts which  
12 suggests that since lower case cure is being used there, and  
13 amounts is stated in the disjunctive, that that would  
14 include non-monetary cure like performance obligation.

15 MR. BAREFOOT: Correct, Your Honor.

16 THE COURT: But, at the same time, the cure costs  
17 that the cure notice and -- I'm sorry, the assumption and  
18 assignment notice, which is governed by 28 of the order,  
19 paragraph 28, and paragraph 31, is really limited by -- in  
20 the definition of cure costs to amounts and I don't know  
21 how, as a practical matter, you could state a performance  
22 obligation when the cure -- when the assignment notice says  
23 provide your cure costs, which is amounts.

24 MR. BAREFOOT: Your Honor, I think in some cases  
25 that might be true. But, here, the landlord has a cost for

1 what it thinks this is going to be required to -- assuming  
2 that their allegations are correct, they put it in in their  
3 proof of claim. They put it in the subsequent cure  
4 objection they filed.

5 THE COURT: Well, I understand it's -- but, even  
6 that number is still unliquidated, right? I mean, that's  
7 the number that they say but then there's potentially  
8 additional costs given that this -- this still hasn't been  
9 repaired. I mean, conceivably, it could be worse because it  
10 hasn't been -- the repairs haven't happened.

11 MR. BAREFOOT: Your Honor, if -- if there are  
12 subsequent conditions that develop, such as the septic tank  
13 thing that we'll come to in a moment, obviously, you know,  
14 that can be dealt with.

15 This was a specific set of issues that there was  
16 already a State Court litigation on. There was already  
17 discovery in the State Court on --

18 THE COURT: No. I'm saying even with these issues,  
19 they stated, when they filed their claim in April, I think  
20 it was April, there's a 700+ thousand dollar number.

21 But, even there, you know as we all know, the  
22 longer something isn't repaired -- I'm assuming for the sake  
23 of this because it's the complaint, the motion to dismiss  
24 complaint, that the repairs are warranted. The longer  
25 something isn't repaired it's often the case it's more

1       costly to repair it.

2               So I guess I hear you on this point that if the  
3       performance obligation is quantifiable, it should be covered  
4       by this language --

5               MR. BAREFOOT:   Correct, Your Honor.

6               THE COURT:   -- and barred if you don't -- at least  
7       as to the amount of that claim that existed then.

8               MR. BAREFOOT:   And, Your Honor, I just want to  
9       note, this was a pre-existing litigation.

10              THE COURT:   No.   I understand that.

11              MR. BAREFOOT:   With a very specific --

12              THE COURT:   But look if you don't repair --

13              MR. BAREFOOT:   -- set of repairs.

14              THE COURT:   -- a pot hole, it gets worse.

15              MR. BAREFOOT:   Understood.   But -- and if the  
16       complaint had segregated out and said these are the repairs  
17       that were at issue in the State Court litigation, these are  
18       things that have arisen prior, we would not be making this  
19       argument.

20              THE COURT:   Okay.

21              MR. BAREFOOT:   And we're not making this argument,  
22       for example, with respect to the septic tank allegations.

23              THE COURT:   Right.   Okay.

24              MR. BAREFOOT:   But there was a very specific set  
25       of repairs and they sought to substitute Transform into the

1 State Court complaint.

2 THE COURT: All right. I guess I --

3 MR. BAREFOOT: On that exact set.

4 THE COURT: Maybe I'm being a little too -- I hate  
5 this word, but too granular on this.

6 I had the impression in reading your motion and the  
7 reply that you were stating that anything at all related to  
8 the asserted repair claim is time barred because of the  
9 failure file a timely cure cost statement.

10 It seems to me that that shouldn't apply, at a  
11 minimum, to costs that were, at that point, unliquidatable  
12 or unliquidated.

13 MR. BAREFOOT: Fair enough, Your Honor.

14 We used the specific defined term I think roof and  
15 parking lot repairs.

16 THE COURT: Yeah.

17 MR. BAREFOOT: Which was defined with reference  
18 back to the allegations in the State Court.

19 THE COURT: To the -- but -- so the specific  
20 repairs that were to be done then.

21 MR. BAREFOOT: Correct. And that there was a  
22 report that was filed that was from a consultant --

23 THE COURT: Right.

24 MR. BAREFOOT: -- that detailed the conditions as  
25 of that point in time.



1 THE COURT: Okay.

2 MR. BAREFOOT: And that they certainly could have  
3 and did have a monetary estimate for in January 2019.

4 THE COURT: But, I guess going to bigger point  
5 then, because I'm -- maybe I'm wrong but I'm assuming that  
6 if there are any additional post-deadline added costs to  
7 that same project, because the repairs haven't been done,  
8 they probably wouldn't be covered by this paragraph.

9 But the bigger point is the seven hundred and some  
10 thousand dollars that's claimed and I guess -- let me  
11 paraphrase your argument.

12 I think what you're saying is that if you are able  
13 to quantify the costs, which is the definition of cure  
14 costs, it's a quantified amount, and you don't put it in  
15 your cure response, which is everyone acknowledges it wasn't  
16 done here, then not only are you barred from recovering  
17 those costs from the tenant, now the assignee, but, in  
18 addition, you can't ask the tenant or demand the tenant,  
19 under the performance obligations of the lease, to make the  
20 repairs because the same amount of money would be spent  
21 there.

22 MR. BAREFOOT: That's exactly correct, Your Honor.  
23 And --

24 THE COURT: Because you knew the amount of money so  
25 you --

1 MR. BAREFOOT: Correct.

2 THE COURT: -- could have said --

3 MR. BAREFOOT: Correct. And interpreting it in  
4 this sort of overly formalistic way to say that even though  
5 references additional cure, which could have been cure in  
6 the form of performance, that that is outside of the scope  
7 of this notice would have really defeated the purpose of  
8 this notice.

9 And would have allowed landlords to -- who didn't  
10 timely respond and who we relied on that non-timely response  
11 in moving forward, to just recharacterize their obligations  
12 and say, okay, fine. I'll -- I'm not going to demand a  
13 check from you. I'm instead going to require you to expend  
14 that same amount to fix the exact same issue.

15 THE COURT: Okay.

16 MR. BAREFOOT: I'll also note, Your Honor, just a  
17 few more points on this before moving on.

18 This landlord is the only landlord that has taken  
19 this interpretation of the cure notice. And Your Honor has  
20 heard a number of other disputes. You may have remembered  
21 the lovely roof in Brighton Colorado or a number of others  
22 where landlords did timely respond and asserted what were  
23 arguably non-monetary cures.

24 I think another reason for that, Your Honor, is  
25 that along with the assumption and assignment notice,

1 Transform did not file but served its adequate assurance  
2 information.

3 So if you were relying not on getting a check from  
4 Transform but instead on having Transform perform repairs,  
5 it would have -- and many other landlords did object to the  
6 adequate assurance information because that would be equally  
7 if not more relevant to assessing the requirements of cure  
8 and assessing, you know, if you were relying on Transform  
9 actually performing the repairs itself.

10 One last point, Your Honor, is that the landlord's  
11 own behavior and conduct of this litigation and in this  
12 proceedings is really contrary to an assertion that they  
13 read this and understood that monetary cures would be barred  
14 but that somehow non-monetary cures would not be barred.

15 They filed a proof of claim against the debtor for  
16 \$769,500. They ultimately filed a subsequent cure notice in  
17 April that also asserted monetary cures and they're now  
18 continuing to assert monetary cures in both their complaint  
19 and their amended complaint.

20 So it's a little at odds and disingenuous to say  
21 that we understood by not responding to this order, we would  
22 be barred from non -- from monetary cures, we were relying  
23 on non-monetary cures. When, in fact, the record of the  
24 litigation shows that they continued to assert and pursue  
25 monetary damages as well.

1 THE COURT: Okay.

2 MR. BAREFOOT: Your Honor, I'll then mover to the  
3 alternative point on excusable neglect which would  
4 indisputably apply to monetary cures and, depending on how  
5 Your Honor, reads the --

6 THE COURT: Well, there's no motion for --

7 MR. BAREFOOT: That's exactly my point, Your  
8 Honor. They, in their response brief, made general pleas to  
9 bankruptcy courts being courts of equity and giving an  
10 equitable time to respond. They don't cite to the Pioneer  
11 factors. They don't cite to the standard for adequate  
12 assurance.

13 We think that's procedurally inappropriate in this  
14 context and, moreover it is their --

15 THE COURT: You mean, the standard for excusable  
16 neglect.

17 MR. BAREFOOT: For excusable neglect.

18 THE COURT: Right.

19 MR. BAREFOOT: Because it is their burden to  
20 demonstrate excusable neglect.

21 And, most importantly, Your Honor, to put in  
22 evidence on what the reason was that they failed to timely  
23 respond, they've mad argument in their brief, unsworn  
24 argument, that they read the cure notice in a certain way.

25 As I said, I think their conduct is contrary to

1 that assertion. But in any event there's no declarations.  
2 There's no admissible evidence that would really allow the  
3 Court to even engage in the Pioneer analysis.

4 So I don't think any claim for excusable neglect is  
5 really properly before the Court.

6 THE COURT: Okay. Well, you mentioned the  
7 landlord's conduct in this litigation. It's part of your  
8 argument in support of the timeliness point.

9 I guess what you're -- I mean, obviously, I should  
10 not be considering things that I can't either take judicial  
11 notice of or that are incorporated into the complaint.

12 But you're really focusing on the -- things that  
13 are actually alleged in the complaint like the proof of  
14 claim, the complaint itself.

15 MR. BAREFOOT: Correct. And that are before Your  
16 Honor.

17 THE COURT: But they -- the other side points out  
18 that Transform actually spent, consistent with the cure  
19 provisions of the assignment order as well as the sale  
20 order, considerable time trying to work out an agreement on  
21 the repairs.

22 MR. BAREFOOT: Absolutely, Your Honor. And that's  
23 consistent with the provisions in the assumption and  
24 assignment order itself --

25 THE COURT: Right.

1 MR. BAREFOOT: -- which required us -- I mean,  
2 we --

3 THE COURT: But if -- I was -- I mean, if you're  
4 saying that they have no cure right, then you wouldn't be  
5 required to work out a cure issue. But --

6 MR. BAREFOOT: Your Honor, we have a relationship  
7 with this landlord. We're continuing as of now to operate  
8 in the store and, you know, it's always our preference to  
9 try to resolve these things and avoid the costs and the  
10 burden on the Court for all this litigation.

11 I think you're right. If we had just said to them  
12 at the outset, you're barred. We might have ended up here  
13 earlier. But we did engage in a back and forth in an effort  
14 that sort of started with the State Court and a mediation  
15 process that went through that to see if there was a way we  
16 could come up -- we did make certain repairs. We talked  
17 about those repairs and they were ultimately unsatisfactory  
18 to the landlord.

19 But that was really all a part of the process  
20 contemplated by the assumption and assignment order that  
21 required us to really meet and confer and see if we could  
22 resolve this before bringing anything to Your Honor.

23 THE COURT: So, I mean, to me, that's actually  
24 outside of the pleadings. So I don't think it's appropriate  
25 in the response to a motion to dismiss.

1 But that, too, might be appropriate in the context  
2 of a motion under Pioneer, I'm assuming. It may or may not.  
3 I mean, I think it might be relevant when those discussions  
4 happen, et cetera.

5 MR. BAREFOOT: I would take the opposition  
6 position, Your Honor. But, in any event, for today, there  
7 is no Pioneer motion.

8 THE COURT: Right.

9 MR. BAREFOOT: And I would think, Your Honor, the  
10 Pioneer motion would have had to have been brought before  
11 the motion to dismiss was going to be heard if you were a  
12 prudent litigant.

13 But let me move on.

14 I think the next question, just in the order it was  
15 briefed, is the question of jurisdiction over the septic  
16 tank dispute.

17 The septic tank dispute was not part of the  
18 original cure allegations.

19 THE COURT: I have one question on this.

20 MR. BAREFOOT: Please.

21 THE COURT: I believe I know the answer to this but  
22 is it the case that after the assumption and assignment the  
23 debtors bear no obligation for post-assignment breaches of  
24 the lease?

25 MR. BAREFOOT: That is correct, Your Honor. Not

1 only under 365(k) but the assumption and assignment order is  
2 crystal clear on that point.

3 THE COURT: And I knew the answer to that one  
4 because of the assumption and assignment order but the issue  
5 here is is -- and maybe this is a question for you, sir, the  
6 septic tank issue, is that a post-assignment breach?

7 MR. BAREFOOT: Your Honor, it's alleged to have  
8 arisen in I believe August or September, well after the May  
9 assignment.

10 THE COURT: Okay. Is that right, sir?

11 MR. BAUCHNER: It's post-assignment. Yes, Your  
12 Honor.

13 THE COURT: Okay. All right. So my preliminary  
14 conclusion on this, although it's pretty -- it's a little as  
15 preliminary as you could get, is that I do not have related  
16 to jurisdiction that I can exercise under 28 U.S.C. Sections  
17 157 and 134. That would be the only available jurisdiction  
18 on this issue since it's a post-assignment issue and since  
19 there's no conceivable effect on the debtors' estate, that  
20 would not be related to jurisdiction under the Pacor v.  
21 Higgins test which is the law in the Second Circuit.

22 And as far as supplemental jurisdiction is  
23 concerned, I don't think I need to delve into the  
24 controversy among the lower courts, which I previously  
25 delved into, although one of the district judges here



1 disagrees with it, whether bankruptcy courts, as opposed to  
2 district courts, have separate supplemental jurisdiction  
3 given that it's not specifically recognized in 28 U.S.C. 157  
4 in the supplemental jurisdiction statute is a separate  
5 jurisdictional basis, 28 U.S.C. Section 1367, which  
6 incorporates the -- which -- I'm sorry, which refers only to  
7 the district courts' jurisdiction, not bankruptcy courts;  
8 157 of the Judicial Code for certain matters gives  
9 jurisdiction to bankruptcy courts through the order of  
10 reference.

11 There's no order of reference in that section of  
12 supplemental jurisdiction. So I think there is a truly  
13 legitimate controversy here.

14 There is a note in passing in *In re Lionel Corp.*,  
15 29 F.3rd 88, 92 (Second Cir. 1994) that bankruptcy courts  
16 have supplemental jurisdiction. I don't think it's  
17 necessary to the holding.

18 But I don't believe I really need to get there  
19 because here the basis for supplemental jurisdiction, I  
20 think even if I did have it, would be lacking in that the  
21 septic tank issue is a wholly different issue. It's a  
22 wholly different breach issue that the breaches that were --  
23 are asserted to have been pre-assumption and assignment and  
24 actually have dealt with septic tank litigation in the A&P  
25 case and septic tanks have very little to do with roofs and

1 parking lots.

2 And there's -- it's not the -- it's really a reason  
3 to have supplemental jurisdiction here; that there is  
4 another dispute under the lease. It's -- I mean that would  
5 mean I would have supplemental jurisdiction on a rent issue  
6 in the future.

7 It's -- and courts have made it clear that there's  
8 a time when bankruptcy courts jurisdiction ends and I  
9 believe it ended here upon the assignment.

10 So that's my -- you can try to persuade me  
11 otherwise but I think that's how it comes out here.

12 MR. BAREFOOT: Completely understood, Your Honor,  
13 and I think that's underscored here by the fact that the  
14 complaint was originally pled without the septic tank  
15 allegations. It wasn't central of the claims and was added  
16 later.

17 But let me move on, Your Honor, then to the handful  
18 of individual claims.

19 Your Honor, just to be clear, kind of doctrinally,  
20 there would be the same bar on the failure to respond to the  
21 bidding procedures order. Undisputedly for monetary damages  
22 for all of these additional claims. And then if Your Honor  
23 agrees with our interpretation, even to the extent that they  
24 seek specific performance.

25 Your Honor, the first one is the -- and I'll also

1 note that all of these same causes of action were withdrawn  
2 in the State Court action following a conference with the  
3 State Court and only the breach claim itself was proceeding  
4 in the pre-petition State Court litigation.

5 THE COURT: But they weren't withdrawn with  
6 prejudice?

7 MR. BAREFOOT: They were not, Your Honor.

8 THE COURT: Okay.

9 MR. BAREFOOT: On the good faith and fair dealing,  
10 Your Honor, it's black letter law that  
11 plaintiffs --

12 THE COURT: I don't think I need any more on this  
13 other than what's in the briefs. You could try to persuade  
14 me otherwise, sir. But I understand the argument.

15 MR. BAREFOOT: Fair enough, Your Honor.

16 THE COURT: I ruled on this issue yesterday.

17 So --

18 MR. BAREFOOT: I'll reserve for reply then.

19 THE COURT: Okay.

20 MR. BAREFOOT: Thank you, Your Honor.

21 MR. BAUCHNER: Good afternoon, Your Honor.

22 Joshua Bauchner --

23 THE COURT: Good afternoon.

24 MR. BAUCHNER: -- with Ansell, Grimm & Aaron.

25 THE COURT: And by the way I apologize you had to

1 sit through an hour and a half of something that I had not  
2 scheduled for today's hearing. So --

3 MR. BAUCHNER: Thank you for that, Your Honor. It  
4 did have some entertainment value.

5 Your Honor, this is a bait and switch.

6 They knew about the pending State Court action.  
7 They -- it's the same people. The same principals. In  
8 fact, Ms. Carrie Koons (ph), who was involved in the State  
9 Court action, as a principal of the debtors, now involved on  
10 Transform.

11 Yet they filed a cure amount of zero. If they're  
12 claiming that the State Court action was about a monetary  
13 default, why did they file for zero?

14 That was dishonest if that's the case. We  
15 understood --

16 THE COURT: Well, they --

17 MR. BAUCHNER: -- it --

18 THE COURT: -- they had not agreed to the State  
19 Court action. The cure amount was the amount that the  
20 debtor had agreed to as a cure amount. That's what they  
21 were supposed to assert.

22 MR. BAUCHNER: I understand, Your Honor. But if  
23 they understood it to be a monetary amount, how could they  
24 have --

25 THE COURT: No but it's not -- the cure amount,

1 just to be clear, when a debtor is directed to file a cure  
2 notice, they give notice of the amount that they believe is  
3 owing.

4 MR. BAUCHNER: Right.

5 THE COURT: It's not an amount that is claimed  
6 against them. It's the amount they believe is owing. So --

7 MR. BAUCHNER: I understand they believe it was --  
8 that they believe zero was owing. We don't disagree because  
9 we have not, contrary to what counsel said, ever found this  
10 to be a liquidated and monetary default.

11 In fact, Your Honor, there were nearly a dozen  
12 letters back and forth, each of which demanded specific  
13 performance. We have never, Your Honor, suggested that this  
14 was a monetary default. We've always --

15 THE COURT: Well, there's an ad damnum clause in  
16 the complaint for a specific amount of money plus a proof of  
17 claim for a specific amount of money.

18 MR. BAUCHNER: And, Your Honor, we had to do that  
19 because, as you know, if you don't plead it, you lose it.

20 THE COURT: Right.

21 MR. BAUCHNER: But the complaint also sought  
22 specific performance, an injunction. We actually filed on  
23 an order to show cause and they agreed to remediate.

24 All of the back and forth we had with them was for  
25 their -- them to remediate the condition. I mean, a year's

1       worth of letters; two years' worth of letters.

2               Our entire point was that they need to perform  
3       under the lease and the reason for that, Your Honor, is we  
4       couldn't because it was interrupt their business.

5               THE COURT: Well, you had the right to.

6               MR. BAUCHNER: We had the option to.

7               THE COURT: And they're not -- I don't know, maybe  
8       Sears does have a whole repair crew. But they have to pay  
9       money to do that, right?

10              MR. BAUCHNER: Of course they would have to pay  
11       money to do that but we don't know how much that's going to  
12       cost.

13              They were paying money, claiming all they needed to  
14       do was patch the roof.

15              THE COURT: Right.

16              MR. BAUCHNER: What this is going to come down to,  
17       Your Honor, is simply this. If they're contention is that  
18       as of the date of the assignment, the condition of the roof  
19       prior to, they're exempt from remediating, but, as you  
20       pointed out, it's a maintenance issue. As the roof is  
21       deteriorating as we speak, anything subsequent  
22       deterioration, they're now responsible for, is a fiction  
23       because the roof needs to be replaced.

24              THE COURT: Well, I don't know. Again, I've had  
25       plenty of landlords stand up in front of me and say, this

1 roof needs to be replace and lo and behold eventually they  
2 reach an agreement on the repairs.

3 MR. BAUCHNER: Well we have not reached an  
4 agreement on the repairs. We have a property condition  
5 report from two years ago that said it needed to be replaced  
6 at that time.

7 But, just as a pragmatic issue, Your Honor, how  
8 will that work? How will it work if they say that as of the  
9 date of the assignment, the condition of the roof is --

10 THE COURT: I agree with that point.

11 MR. BAUCHNER: Right. And --

12 THE COURT: I understand that point. Yeah.

13 MR. BAUCHNER: -- then the same thing --

14 THE COURT: And I think that's probably why they  
15 were in discussions with you because at some point they  
16 don't want the roof to cave in.

17 MR. BAUCHNER: Neither do we. And that's why the  
18 Court, the State Court next door was so concerned because of  
19 the safety issue.

20 THE COURT: Right.

21 MR. BAUCHNER: It's the same thing with the parking  
22 lot.

23 THE COURT: But it isn't a -- but there is an  
24 allocation of costs and we are talking about amounts and the  
25 claim. So I guess I --

1 MR. BAUCHNER: Your Honor --

2 THE COURT: I think where you have an obligation,  
3 and this is consistent with the Bankruptcy Code's broad  
4 definition of claim, which is in Section 105, I'm sorry,  
5 101(5). Let me just get that.

6 A claim is defined very broadly. A right to  
7 payment whether or not such right is reduced to judgment,  
8 liquidated, unliquidated, fixed, contingent, matured,  
9 unmatured, disputed, undisputed, legal or equitable, secured  
10 or unsecured or (b) a right to an equitable remedy for  
11 breach of performance if such breach gives rise to a right  
12 to payment; whether or not such right to an equitable remedy  
13 is reduced to judgment, fixed, contingent, matured,  
14 unmatured, disputed, undisputed, secured or unsecured.

15 So, for example, when a contract for -- in the out  
16 of court context upon a breach would have a right to  
17 specific performance, as an equitable remedy, if there can  
18 be a monetary remedy to, courts will hold that that's the  
19 remedy you get in bankruptcy, consistent with the definition  
20 of claim.

21 It's hard for me to see here how this obligation --  
22 I'm just talking about the pre-assignment obligation, not  
23 post-assignment. The pre-assignment obligation can be  
24 barred as far as it seeks payment of money directly but not  
25 barred if it requires payment of money to third parties to



1 do the same thing; either repair the roof. To me, that's  
2 not what the cure notice was about, to have that  
3 distinction.

4 Any point where you're paying money, as opposed to  
5 where you can't pay money, I think is covered the cure  
6 notice.

7 MR. BAUCHNER: Your Honor, we understood quite  
8 simply that cure costs as defined in the order related to  
9 monetary defaults. That's what the --

10 THE COURT: It is a monetary default.

11 MR. BAUCHNER: Your Honor, it's not a monetary  
12 default if we were consistently seeking --

13 THE COURT: No, no. It actually doesn't really say  
14 that. Again that -- the definition here, and it all tracks  
15 back to the motion because that's the footnote in the order  
16 and everywhere else, as far as where you get the defined  
17 terms that aren't otherwise defined.

18 So the motion, in paragraph 13(a)(v) defines cure  
19 costs and it says the debtors' calculation of the amount  
20 necessary to cure any defaults thereunder. So it is an  
21 amount. It does refer to amount.

22 But to cure any defaults. So, it's a dollar amount  
23 that you pay to cure any default. That may mean that you  
24 pay it to the landlord which is what one form of relief in  
25 the complaint is or it may mean you pay it to a bunch of

1 contractors to cure the default which is the performance  
2 default, which, you know, you've cited the paragraphs in the  
3 lease that provide for maintenance.

4 But it's money and I think that's what this  
5 definition is; the amount necessary to cure any defaults.  
6 And you pay the money to cure what's been labelled here as a  
7 performance default. It's that type of default that can  
8 actually be performed.

9 MR. BAUCHNER: It can -- but it can't be  
10 quantified, Your Honor, and that's the problem.

11 THE COURT: Oh, it certainly can be qualified.  
12 There's a bill. I mean, do you pay the money?

13 MR. BAUCHNER: There isn't a bill.

14 THE COURT: Well, there will be. It's an ongoing  
15 performance default and, under 365(b)(1)(a), they would have  
16 to -- they have to cure it.

17 MR. BAUCHNER: So, forgive my ignorance, Your  
18 Honor.

19 If the roof collapses tomorrow and it needs to be  
20 repaired, are they obligated then to repair the roof; to  
21 replace the roof?

22 THE COURT: They -- well, just the repair part?

23 MR. BAUCHNER: Well, the roof collapsed. It has to  
24 be replaced at this point.

25 THE COURT: Yeah. I understand. I believe that

1 they are not obligated for the pre-petition amount that  
2 should have been noticed.

3 MR. BAUCHNER: So, if the --

4 THE COURT: But they are obligated for whatever  
5 else is on top of that.

6 MR. BAUCHNER: So -- and what is that pre-petition  
7 amount because --

8 THE COURT: Well, you would have to figure that  
9 out.

10 MR. BAUCHNER: -- that's never -- so --

11 THE COURT: I mean, it's asserted. It's asserted  
12 and in the claim there was actually -- not the pre-petition  
13 amount, the pre-assignment amount, excuse me. I misspoke.

14 I mean the clearest thing to it is the seven  
15 hundred and some thousand dollars that asserted in the proof  
16 of claim and in the complaint. That's a quantifiable  
17 amount.

18 I think the proof of claim said, you know, reserve  
19 some extra language. That may or may not be quantifiable as  
20 of the assignment date.

21 But I think that's the amount that clearly, at this  
22 point, is time barred; that amount.

23 MR. BAUCHNER: So --

24 THE COURT: There may be lots of other amounts at  
25 this point and if the roof falls, it would be much bigger

1 because it's not a repair at that point or well maybe they  
2 could repair it more cheaply. I don't know. Maybe they  
3 could repair it for \$500,000. You know? They're able to  
4 get a crack engineering team and repair it for five -- but  
5 it -- I think that's the distinction.

6 MR. BAUCHNER: So are any of the repair costs  
7 associated with the parking lot or the roof are offset by  
8 that \$700,000 figure effectively is Your Honor's ruling.

9 THE COURT: I think so, yeah.

10 MR. BAUCHNER: And anything that -- now what about  
11 the concern, Your Honor, as you pointed out earlier, these  
12 are maintenance obligations? The longer they wait -- I  
13 mean, the longer they wait --

14 THE COURT: That's true.

15 MR. BAUCHNER: -- to repair the roof, the more  
16 expensive it gets.

17 THE COURT: They don't want to have pot holes  
18 either.

19 MR. BAUCHNER: And yet they've had them for two  
20 years.

21 THE COURT: But --

22 MR. BAUCHNER: And Your Honor --

23 THE COURT: But this is just a question of  
24 allocation. So I'm assuming they're going to get on the  
25 stick with you now that you all know how to allocate the

1 costs and someone will do the repairs, hopefully you'll be  
2 able to agree on that. And the first seven hundred and -- I  
3 forget the exact number, seven hundred and sixty something,  
4 will be paid by the landlord and the rest will be paid by  
5 the debtors.

6 MR. BAUCHNER: So had we not filed in April, there  
7 would be no 700,000 figure.

8 THE COURT: No.

9 MR. BAUCHNER: That comes from our filing.

10 THE COURT: Well, I know. That makes it easy to  
11 quantify.

12 MR. BAUCHNER: Right. But had we not filed it then  
13 -- you know, so we tried to do something reserve rights and  
14 it's now coming back to bite us in the you know what.

15 THE COURT: It's not -- no, because --

16 MR. BAUCHNER: But it was an estimate.

17 THE COURT: -- you would still have to quantify it.  
18 You would have to quantify the pre-assignment cost.

19 MR. BAUCHNER: Which is impossible because --

20 THE COURT: No. You could do it. You've done it.  
21 You did it. So, it's clearly not impossible. But it was  
22 done.

23 MR. BAUCHNER: If we had to do it today, we  
24 couldn't. No roofer -- if I may, Your Honor --

25 THE COURT: No, but it's not today. It's as of the

1 assignment.

2 MR. BAUCHNER: I understand that. But no one  
3 today, if we had not filed that, no one as of the assignment  
4 inspected the roof, took a snapshot of the roof, and said  
5 it's going to cost "X" amount to fix it as of the assignment  
6 day --

7 THE COURT: But you've been --

8 MR. BAUCHNER: -- and now, today -- if I may, Your  
9 Honor. Please, if I may --

10 THE COURT: Okay.

11 MR. BAUCHNER: -- as of today, December 13th, it  
12 costs "X" plus "Y" which is effectively what is the ruling.

13 THE COURT: Well but there's -- I mean, there's --  
14 it was done because there's a number.

15 MR. BAUCHNER: Right.

16 THE COURT: And that number isn't the cap on what  
17 is the landlord's. If Transform can show that, you know, in  
18 addition these other costs were there, pre-assignment, then  
19 that would be the landlord's too. You know? Because they  
20 weren't asserted.

21 It's just the post-assignment costs that are not  
22 the landlord's.

23 MR. BAUCHNER: And I just would submit, Your Honor,  
24 that it's very difficult for a contractor to be able to take  
25 that date -- you know, the \$700,000 was an estimate.

1 THE COURT: I don't know. I don't know if that's  
2 the case.

3 MR. BAUCHNER: I do.

4 THE COURT: I mean, I'm not sure. I mean, it may  
5 be that it was hit by lightening last week. That would be a  
6 difference.

7 MR. BAUCHNER: That's my point.

8 THE COURT: That's a big difference.

9 MR. BAUCHNER: That's my point. So those costs  
10 that are arising from the continuing deterioration. As of  
11 the date of the assignment, no one knows what the cost is.

12 THE COURT: Well, I think you -- I think it it's  
13 just normal wear and tear, you can pretty well tell. I  
14 think you can -- there's probably depreciation that you  
15 could do. There are probably ways you could tell.

16 People budget for repairs over time. So just --  
17 the -- I mean, the assignment was in March; is that when it  
18 happened? I forget.

19 MR. BAUCHNER: It was May 13th.

20 THE COURT: May. It was May. So, there you go.  
21 And so you really -- you're only talking about quantifying  
22 the difference between April when the claim was filed and  
23 May 13th. And everything after that is up to Transform.

24 MR. BAUCHNER: So are we then permitted to sue  
25 Transform in State Court for everything after that?

1 THE COURT: But -- yes, after you're credited for  
2 the pre-amount. Yes.

3 MR. BAUCHNER: Yes.

4 THE COURT: Yeah. They took on the ongoing  
5 obligations. Yes.

6 MR. BAUCHNER: Right. So, effectively, then are  
7 State Court action should include anything from the May 3rd  
8 assignment forward for roof and the parking lot --

9 THE COURT: Yeah. But that doesn't mean that the  
10 whole cost of repairing the roof is post-assignment because  
11 no work's being done then.

12 MR. BAUCHNER: I understand.

13 THE COURT: Okay.

14 MR. BAUCHNER: You're saying there's an offset of  
15 the \$700,000.

16 THE COURT: And maybe more. Maybe there's -- you  
17 know, if actually more of that was quantifiable then and  
18 just wasn't, then --

19 MR. BAUCHNER: I invite them to show it. But --

20 THE COURT: Well, no. That's -- at that point  
21 that's going to be their burden.

22 MR. BAUCHNER: Right.

23 THE COURT: And you've laid that out.

24 MR. BAUCHNER: That's a pretty hard thing to do.

25 THE COURT: Right.



1 MR. BAUCHNER: But I invite them to do it. So,  
2 then, we're litigating next door.

3 THE COURT: Well, I don't know. I don't know about  
4 that. Well, yes. I think that's right. I mean, I actually  
5 did -- yes because I now know conclusively that we're  
6 talking about the post-assignment period and the debtor has  
7 no stake in this at that point. So --

8 MR. BAUCHNER: Right.

9 THE COURT: -- I don't think the stay applies at  
10 that point.

11 MR. BAUCHNER: So then next door we're litigating  
12 the septic tank. There's now a problem with the fire  
13 system. We're going to litigate that next door.

14 THE COURT: Anything post-assignment.

15 MR. BAUCHNER: Right.

16 THE COURT: Sure.

17 MR. BAUCHNER: And the roof and the parking lot,  
18 post-assignment deterioration, to the extent someone could  
19 quantify it, all next door.

20 THE COURT: Yes. I think that's right. I mean,  
21 I'm happy to hear the other side but that's how I'm looking  
22 at this.

23 MR. BAUCHNER: Okay. I mean, it's just -- and then  
24 are we continuing to litigate the pre-assignment --

25 THE COURT: Well, look. I have a motion to dismiss

1 --

2 MR. BAUCHNER: -- issue here?

3 THE COURT: -- on these other points.

4 MR. BAUCHNER: Right.

5 THE COURT: And I think I should rule on them  
6 because there's no reason to deal with these other issues,  
7 frankly. I mean, this is a contract dispute.

8 MR. BAUCHNER: Agreed.

9 THE COURT: It's not a quantum meruit or unjust  
10 enrichment or anything like that.

11 MR. BAUCHNER: Oh, you mean, the alternative  
12 counts?

13 THE COURT: Yeah.

14 MR. BAUCHNER: Well, I mean, the law is clear, Your  
15 Honor, both under the federal rules and under New York law  
16 that we can plead in the alternative.

17 THE COURT: But you can't plead a cause of action  
18 that doesn't exist because the elements of the cause of  
19 action aren't plead.

20 It's clear, here, because the contract is  
21 incorporated into the pleadings, the lease. But the parties  
22 have a lease. So that governs. You can't show unjust  
23 enrichment except where there isn't a contract and you can't  
24 show breach of the implied covenant of good faith and fair  
25 dealing except as in New York an element of your contract

1 claim.

2 So there's nothing wrong with arguing good --  
3 breach of good faith and fair dealing as part of the  
4 contract claim. But it's not a separate cause of action.

5 MR. BAUCHNER: Your Honor, Rule 8(d)(2)  
6 specifically permits us to allege multiple counts even if  
7 they're inconsistent.

8 THE COURT: You can allege them but if the contract  
9 that destroys one of the counts is part of the complaint,  
10 which it is, the lease, then it destroys part of the counts.

11 Just like what -- I equate to what you're saying  
12 here is you can plead in the alternative. Yes, that's  
13 right. But if one of the causes of action simply doesn't  
14 lie because of what's in the complaint, that alternative  
15 pleading is --

16 MR. BAUCHNER: Fine, Your Honor.

17 THE COURT: -- is denied.

18 MR. BAUCHNER: I'm less concerned about the  
19 alternative counts --

20 THE COURT: Okay.

21 MR. BAUCHNER: -- if everyone's going to stipulate  
22 to the existence of the contract.

23 THE COURT: Well, they are. They --

24 MR. BAUCHNER: Okay.

25 THE COURT: I mean, you would win on that basis.

1 They acknowledge that there's a lease.

2 MR. BAUCHNER: And I think it will be curious.

3 We're going to --

4 THE COURT: Look. If they somehow say there's no  
5 lease --

6 MR. BAUCHNER: I've had that. That's my concern,  
7 Your Honor.

8 THE COURT: Well, all right. If they say there's  
9 no lease, then you can come back and I'll vacate my order  
10 because --

11 MR. BAUCHNER: Okay.

12 THE COURT: -- they're judicially estopped from  
13 saying that because I just won -- they just won on the basis  
14 that they've said there is a lease.

15 MR. BAUCHNER: As long as they -- they're saying  
16 there's a lease that provides them with this maintenance  
17 obligation, and they're not going to challenge that, that's  
18 fine.

19 THE COURT: Well --

20 MR. BAUCHNER: It's just --

21 THE COURT: -- there's a lease.

22 MR. BAUCHNER: -- next door, there was a challenge.

23 THE COURT: There's a lease and it's governed by  
24 its terms.

25 MR. BAUCHNER: Agreed.

1 THE COURT: I don't think you're trying to be  
2 tricky on this.

3 MR. BAUCHNER: No. Not at all, Your Honor.

4 THE COURT: I don't want them -- their silence to  
5 be implied later as saying that they agree that they have  
6 this specific maintenance obligation that you say they have.

7 It's --

8 MR. BAUCHNER: It's in the lease.

9 THE COURT: It's -- whatever's in the lease --

10 MR. BAUCHNER: Agreed. Right.

11 THE COURT: And I think the unjust enrichment claim  
12 is based on the same facts as are covered by that provision.

13 MR. BAUCHNER: So the Court next door has asked for  
14 guidance from Your Honor with respect to this issue and I  
15 just want to insure that your order --

16 THE COURT: Which I understand that the Court  
17 didn't rule because it felt that there was no jurisdiction  
18 because this was till pending here.

19 MR. BAUCHNER: Yes.

20 THE COURT: I don't really understand what it was  
21 that the Court -- the State Court wanted from me.

22 MR. BAUCHNER: Well, Mr. Barefoot argues to the  
23 Court, to the law secretary, that all these issues were  
24 subject to this Court's jurisdiction.

25 THE COURT: Well, they -- they are until now.

1 MR. BAUCHNER: And -- well, correct. So my point  
2 is I just -- we need -- I just want to make sure that the  
3 Court's order is clear; any maintenance issues that arises  
4 after May 3rd is subject to the jurisdiction of the State  
5 Court, which is what I understand Your Honor is to be saying  
6 today. That case could be resuscitated. We could  
7 substitute in the assignee. We'll allow in all of the new  
8 defaults.

9 THE COURT: Well, you should take out the debtor.

10 MR. BAUCHNER: Oh, I'm sorry, yes. We'll replace.  
11 Yes. I didn't mean the word substitute.

12 And then we'll seek specific performance and  
13 another order to show cause and everything else next door.

14 THE COURT: Well, I mean, I --

15 MR. BAUCHNER: That's my concern is we're going to  
16 have two courts.

17 THE COURT: I -- let me back up. We haven't really  
18 dealt with the motion as far as the specific performance  
19 count is concerned.

20 (Pause)

21 THE COURT: But let's deal with the other ones  
22 first.

23 As far as --

24 MR. BAUCHNER: The other counts, Your Honor?

25 THE COURT: Yeah.

1 MR. BAUCHNER: Your Honor, if -- like I said, I'm  
2 happy to withdraw the non-contract count.

3 THE COURT: No. I want to -- no. I want to go  
4 through them in order and starting with the contract count.

5 My view is that first this complaint sets forth two  
6 remedies for breach of contract. The first is for monetary  
7 damages.

8 The second is for specific performance which it  
9 couches injunctive relief. But to the extent it's in  
10 respect of the contract, it's specific performance. The  
11 injunctive relief might be to avoid a safety hazard or  
12 something like that. That's a separate issue.

13 So, I'm focusing on the contract count and the  
14 request for monetary damage and specific performance.

15 Based on my review of the bid procedures order that  
16 I entered in November, it's hard to believe, 2018, which  
17 among other things directed the notice of assumption and  
18 assignment to be sent and provided for a deadline to submit  
19 cure costs, a response to the debtor's statement of cure  
20 costs that is; and the defined term cure cost, which I've  
21 already quoted, that is incorporated from the motion for  
22 approval of that bidding procedures order, I conclude that  
23 to the extent that money would be required to cure any  
24 defaults, pre-assignment defaults, that is, that amount  
25 needed to be asserted by the deadline in the notice and it

1 was not here.

2 And, given that, I believe that the landlord is now  
3 time barred to assert a claim for damages or for specific  
4 performance since the specific performance can be quantified  
5 for breach of the contract, for anything that could be said  
6 to be owing, either as a fixed or unliquidated amount, i.e.,  
7 necessary to make the claimed repairs pre-assignment.

8 In other words, the onus was on the landlord to  
9 file something to the effect of we object to the zero dollar  
10 amount cure costs that in the cure notice from the debtors.  
11 We are owed at least seven hundred and whatever it is,  
12 seventy-six thousand dollars for repairs plus any amounts  
13 thereafter up to the assignment date.

14 That continually was not done and therefore I'm  
15 going to grant the motion to dismiss with respect to the  
16 contract claim for those pre-assignment amounts that could  
17 have been asserted; either as a liquidated amount or an  
18 amount that could be described in an unliquidated basis.

19 On the other hand, as far as an ongoing performance  
20 obligation is concerned, the repairs need to be made. It's  
21 just a matter of allocating the cost and cost that is  
22 attributable to conditions that, for want of a better word,  
23 worsened after the assignment date, would be the tenant's  
24 obligation.

25 I -- and I'm happy to put -- you should lay that



1 out in the order so that it's clear to the State Court Judge  
2 what can be before the State Court Judge.

3 I conclude that I -- to the extent I might have  
4 supplemental jurisdiction to decide the post-assignment --  
5 well, for it to insure a septic tank dispute under 28 U.S.C.  
6 1367, I believe on a motion to dismiss basis, I can conclude  
7 that for purposes -- this is under 12(b)(1) now, I conclude  
8 that for purposes of this matter, the septic tank dispute is  
9 not part of the same case or controversy that I've just  
10 decided. It's really -- the only thing that they have in  
11 common is that it's under a lease. But it's a different  
12 default.

13 And, most importantly, it's a different default in  
14 terms of timing. It's post-assignment, given the assignment  
15 order, I don't have any jurisdiction under 28 U.S.C. 157 and  
16 1334 because it doesn't even relate to the bankruptcy case.  
17 It's not under the Bankruptcy Code. It's not a part of a  
18 cure dispute. It's a post-assignment dispute.

19 So that is clearly a matter that can be before the  
20 State Court.

21 And I don't need to decide whether bankruptcy  
22 courts have this type of jurisdiction or not; although,  
23 frankly, I'm skeptical because it's not provided for in  
24 either 28 U.S.C. 157 as a matter of reference from the  
25 District Court or 28 U.S.C. Section 1367 which only refers

1 to the District Courts having supplemental jurisdiction.

2 I conclude that the claim for breach of the implied  
3 covenant of good faith and fair dealing should be dismissed  
4 here given that it is clear that the claim is based upon a  
5 lease that both parties agree is in existence and therefore  
6 it is really a contract claim. It's not a separate cause of  
7 action under New York law in that context; although the duty  
8 is an implied covenant in the contract. And so it's part of  
9 the contract claim. It can be asserted.

10 See Harris v. Provident Life & Accident Insurance  
11 Company, 310 F.3d 73, 82 (Second Cir. 2002), Leberman v.  
12 Jon Blair & Company, 880 F.2d 1555 (Second Cir. 1989) and In  
13 re Adelpia Communications Corp., 2007 Bankr. Lexus, 2851 at  
14 pages 29 through 30, Bankr. SDNY August 17, 2007).

15 Similarly, I believe the claim for unjust  
16 enrichment must be dismissed under Rule 12(b)(6) given that  
17 it is a claim that does not lie where there is a contract  
18 that covers the same facts.

19 It is a quasi contract claim and under New York  
20 law, therefore, exists only where there is not an express  
21 agreement that governs the particular cause of action. See  
22 Clark-Fitzpatrick, Inc. v. Long Island Railroad Company, 7  
23 N.Y. 2d 382, 388, 389, 1987 and Beth Israel Medical Center  
24 v. Horizon Blue Cross and Blue Shield of New Jersey, 448  
25 F.3d 573, 586 through 87, Second Circuit 2006.

1 I also believe the negligence cause of action  
2 should be dismissed here, in light of the motion, given the  
3 absence in the pleading of a duty of care, specifically, to  
4 the landlord, it's well-established again, pursuant to  
5 Clark-Fitzpatrick v. Long Island Railroad Company, that a  
6 simple breach of contract is not a tort, unless there's a  
7 legal duty independent of the contract itself. That's at 70  
8 F. N.Y. 2d at 389. This is essentially a contract cause of  
9 action. There may a duty to other third parties, and that  
10 was the case in Scarlet v. Boston Properties, Inc., where  
11 the cleaning lady got shocked and had a claim that survived  
12 against a tenant of the building. That's 959 NY F.2d 151  
13 152, First Department 2013, but I don't believe that's the  
14 case here.

15 As far as the cause of action for injunctive  
16 relief, to the extent that this cause of action, again,  
17 seeks specific performance of the contract, I will grant the  
18 motion to dismiss, based on the same rationale that I gave  
19 at the beginning. To the extent it seeks injunctive relief  
20 for health and safety reasons or something like that, under  
21 some other provision of law, which I don't really see here  
22 yet, but you got an injunction once, I don't think that type  
23 of claim is covered by my ruling, you know, because it's to  
24 stop an imminent harm. Now, it may be that it can be dealt  
25 with by payment of money, in which case, my initial ruling,

1 you know, the ruling on the first cause of action applies,  
2 as far as who is responsible pre or post, but to the extent  
3 injunctive relief is tied to that to get something done  
4 quickly, and the Court concludes that it can't sort out the  
5 money immediately, I don't think I should put it different.

6 As it's pled in the complaint, I'm dismissing it.  
7 I'm not saying you're not entitled to any sort of injunctive  
8 claim, but I think you have to make that distinction and  
9 persuade the State Court of the distinction, that it's not  
10 violating the ruling that it's time barred, and I'm also --  
11 at least based on what I have before me today, this can be  
12 dealt with by the payment of money. So you wouldn't have a  
13 right to injunctive relief on this complaint. I hope that  
14 clear and doesn't create, you know, a can of worms, but what  
15 I want to be clear is that I am dismissing this claim for  
16 injunctive relief, but that doesn't mean that there might be  
17 some set of facts and circumstances that might require  
18 injunctive relief in the future.

19 MR. BAUCHNER: So to be clear then, if I may,  
20 basically, the only thing we're litigating in this court is  
21 what you've been referring to as the allocation issue and  
22 next door, we're going to be litigating any defaults,  
23 maintenance defaults, arising May 3rd going forward?

24 THE COURT: Right, and you haven't really made a  
25 motion to lift the stay, but I'd be amenable to signing a

1 stipulation that would allow that amount on the claim issue,  
2 now that I've set the parameters of it, to be decided as  
3 part of your overall dispute. I'm not sure why we have to  
4 have two separate courts doing it. I would just lift the  
5 stay and let that happen, if the parties are amenable to  
6 that. Otherwise, I guess I'll have to hear a motion.

7 MR. BAUCHNER: I'm sorry, Your Honor. Lift the  
8 stay to let the allocation issue, --

9 THE COURT: Let the --

10 MR. BAUCHNER: -- the monetary issue, be  
11 litigated?

12 THE COURT: Yeah, I mean, I've decided the  
13 parameters of the allocation issue.

14 MR. BAUCHNER: Right.

15 THE COURT: It's just applying the facts --

16 MR. BAUCHNER: A number.

17 THE COURT: -- to those parameters. I think you  
18 want to make sense for the State Court, not just a legal  
19 dispute, to decide that issue. That's all I'm saying, but I  
20 don't have that before me right now. You could submit a  
21 stipulation that lifts the stay to let that happen, or  
22 someone could make a motion for relief from the stay so that  
23 that now pretty narrow issue could be decided by the State  
24 Court.

25 MR. BAUCHNER: I think it would make the State

1 Court's head explode. That's my concern.

2 THE COURT: Well, I think the order can lay this  
3 out. I mean, I think --

4 MR. BAREFOOT: Just two points of clarification.

5 THE COURT: I think I've been pretty careful on  
6 what the parameters of the allocation issue are, which are  
7 pretty narrow, and if you lay it out in the order, which I  
8 think you're going to want to do so there's no confusion, I  
9 think it may well be that the State Court can handle that.

10 MR. BAUCHNER: The concern, Your Honor is you had  
11 referenced the urgency (ph) -- is they've announced they're  
12 vacating in February. I mean, we actually submitted --

13 THE COURT: Okay.

14 MR. BAUCHNER: -- an article with our application  
15 to that effect.

16 MR. BAREFOOT: Your Honor, that was outside of the  
17 pleadings.

18 MR. BAUCHNER: Excuse me.

19 THE COURT: Well, --

20 MR. BAUCHNER: Excuse me.

21 THE COURT: No, but we're really talking more  
22 about what might be happening in the future, as far as  
23 allocation of work between the State Court and me.

24 MR. BAUCHNER: Right.

25 THE COURT: I've said enough on this. If people

1 want to agree to let it go to the state court, fine. If  
2 they don't, then someone can make a motion for the stay.  
3 Otherwise, I have that issue, and it's a cure issue.

4 MR. BAUCHNER: And that's, I think, where some of  
5 the urgency comes from. If they vacate and then they just  
6 leave us holding the bag for all the maintenance obligations  
7 they've deferred for the past five years.

8 THE COURT: Okay.

9 MR. BAUCHNER: That seems to be the chief intent  
10 here.

11 THE COURT: Well, I don't know. I mean, that's  
12 maybe for another day.

13 MR. BAREFOOT: Your Honor, can I just ask two  
14 points of clarification? First off, on the rulings that  
15 Your Honor gave, the dismissals with the potential exception  
16 of the injunctive relief are with prejudice?

17 THE COURT: Yes.

18 MR. BAREFOOT: And second of all, to Your Honor's  
19 suggestion of lifting the stay, the debtors aren't a party  
20 to this dispute.

21 THE COURT: No, but it's a cure issue before me.

22 MR. BAREFOOT: Understood.

23 THE COURT: So maybe it would be abstention.

24 MR. BAREFOOT: I wonder whether -- that's what I  
25 was going to suggest, Your Honor.

1 THE COURT: You could have an agreed abstention  
2 order. You're right. It's not a stay issue. It's  
3 abstention.

4 MR. BAUCHNER: Your Honor?

5 MR. BAREFOOT: And I think we'll confer with our  
6 client and with counsel, but I think next steps we'll  
7 propose to not formally settle an order, but discuss with  
8 them an order with the goal of submitting an agreed order  
9 that memorializes --

10 THE COURT: Yeah, hopefully, you'll be able to  
11 agree on one. If not, obviously, see the other side when  
12 you submit the order.

13 MR. BAREFOOT: Of course.

14 THE COURT: And I'll give you some -- you know,  
15 let me know. I mean, we're already talked about it. So  
16 respond promptly to that.

17 MR. BAUCHNER: Of course.

18 THE COURT: Like within a day, and say something  
19 to the effect that this will confirm we're in agreement with  
20 this form, or alternatively, we have some issues. I've  
21 attached a blackline showing our proposed form of order.

22 MR. BAUCHNER: Okay.

23 THE COURT: Or give me two days to do, you know, a  
24 blackline, something like that.

25 MR. BAUCHNER: And, Your Honor, we're dismissing



1 with prejudice claims that haven't been adjudicated on the  
2 merits, where you had earlier said if we could show --

3 THE COURT: Well, it's a motion to dismiss.

4 MR. BAUCHNER: Well, that usually results in a  
5 without prejudice dismissal.

6 THE COURT: Well, but there is no basis for these  
7 claims.

8 MR. BAUCHNER: Well, as you said, if there's  
9 something, an issue with the contract, you would permit us  
10 to refile. It's just in my experience, --

11 THE COURT: Oh, no, but that's -- but no, you rely  
12 on judicial estoppel.

13 MR. BAUCHNER: I Understand, and I don't mean to  
14 quibble with the Court, but in my experience, --

15 THE COURT: Yeah.

16 MR. BAUCHNER: -- unless I'm on a motion to  
17 dismiss, it's a without prejudice dismissal in the absence  
18 of adjudication on the merits, but --

19 THE COURT: Well, I'm not giving you any time to  
20 re-plea to make a Rule 15 motion.

21 MR. BAUCHNER: That's fine. That's fine.

22 THE COURT: You know, for a leave to amend. So --

23 MR. BAUCHNER: Just changes the dynamics, as you  
24 know.

25 THE COURT: The record's clear, though, that, if

1 -- I can't imagine Transform would ever do this. If they  
2 somehow say that there's no lease, there's no lease that's  
3 effective between the parties, they would be judicially  
4 estopped from doing that, because they weren't on the motion  
5 to dismiss. So you would have a remedy there. Okay.

6 MR. BAUCHNER: Thank you, Your Honor.

7 THE COURT: Okay.

8 MR. BAREFOOT: Thank you, Your Honor.

9 THE COURT: Okay.

10 All right, so I'm going to take about a half-hour  
11 break or so, come back about 2:20.

12 MR. BAUCHNER: I'm not sure any of the other  
13 parties are still here.

14 THE COURT: Well, there may be some people on the  
15 phone, and you can let the people in the conference room  
16 know.

17 THE CLERK: Yes.

18 (Recessed at 1:42 P.M.; reconvened at 3:04 P.M.)

19 THE COURT: Please be seated.

20 Is Court Call on also?

21 US: Yes.

22 THE COURT: Okay.

23 All right, we're back on the record in in re:  
24 Sears Holdings Corporation, et al. We're going back to the  
25 unscheduled case conference in this case that was dealing

1 with the administrative expense claims consent program. I  
2 have now had the chance to review those portions of the  
3 confirmation order that deal with the program. So I'm a  
4 little more up to speed on how I believe it was intended to  
5 operate.

6 So where are we at this point?

7 MR. FAIL: Thank you, Your Honor. Garrett Fail,  
8 Weil, Gotshal & Manges for the record again. The debtors,  
9 together with the Creditors' Committee's attorneys and the  
10 Ad Hoc Group proponents have spent the last several hours  
11 and working with M3, going over the numbers to try to  
12 address the factual questions Your Honor had, as well as the  
13 issues that Your Honor articulated, and we believe that we  
14 have a proposal that will address them satisfactorily to the  
15 Court, and so, what we've proposed is, with respect to those  
16 parties who had timely opted in to the program -- so the  
17 universe was the closed universe that we had been speaking  
18 about all morning -- and to whom the debtors reached out for  
19 information and then that responded to us with respect to,  
20 you know, -- so there was a dialogue or emails. We had  
21 reached out. They have reached back, but we have not  
22 communicated back to them.

23 We, the debtors, have not communicated back to  
24 those counterparties. You heard this morning our view that  
25 we didn't think we had to, and we spent the time reconciling

1 others, but to address the concerns that we had not  
2 communicated back and given those parties, you know, a last  
3 chance to come back to us. We propose the following.

4 First, I can identify what the subset is Your  
5 Honor asked, you know, "What are we even talking about?" So  
6 when I was going through the walk-down on the waterfall this  
7 morning, we had identified a subset of assets -- a subset of  
8 ballots that the debtors had said were about 285 that were  
9 allowed, and then we talked about 249 that we were putting  
10 into the second round. So there were 249 where the debtors  
11 thought there was reconciliation to do, and then there were  
12 about 204 that we had determined should be rejected and it  
13 wasn't worth pursuing reconciliation. So there are about  
14 453-ish ballots outstanding.

15 With respect to those parties that had timely  
16 filed and had responded to us prior to the times that would  
17 allow them to have participated in this distribution -- so  
18 with respect to the ballots that came back and the  
19 information that responded prior to November 23rd, for the  
20 folks that were in the first mailing, and by December 1 for  
21 the second, there's roughly \$40 million of asserted ballots  
22 and roughly 153 ballots to look at.

23 So to summarize again, there's about 153 ballots  
24 for which information or communications came back to us in  
25 time for the debtors to have reconciled prior to this

1 distribution, which was on or about December 1. The debtors  
2 propose the following to address the Court's concern. By  
3 this coming Tuesday, December 17th, --

4 THE COURT: 17th, right.

5 MR. FAIL: -- the debtors will email out to the  
6 address that we've received in connection with the balloting  
7 process, the email that's submitted, the debtors' view of  
8 the amounts that they see being allowable, from zero to  
9 whatever the amount is, Your Honor, --

10 THE COURT: Right.

11 MR. FAIL: -- with respect to each claim. It may  
12 be zero. We can express as well the reason for the -- not  
13 the -- you know, not all reasons, given the time frame.  
14 This is not a claims objection, but we will do our best to  
15 communicate the reason. For example, we think you've been  
16 satisfied.

17 We don't believe it's an administrative priority  
18 claim. We don't have any books and records to match it.  
19 We'll do our best to advise, and then we will give those  
20 parties in the email -- we will make clear that we will work  
21 in good faith to try to reconcile those through December  
22 23rd. On that point, Your Honor, I want to just again  
23 express that the protocol that was approved and the  
24 settlement that was approved does not put a burden on the  
25 debtors or change the expectation of creditors that their

1 claims should be or must be allowed in that time frame.

2 The debtors are going to exercise their fiduciary  
3 duties, work with the Creditors' Committee's professionals  
4 and the other ad hoc members to ensure that we're not  
5 allowing claims just to have to allow them, but we will do  
6 our best to reconcile them. Any claims that are reconciled  
7 by the end of the 23rd will be included in an initial  
8 distribution. The debtors will delay the initial  
9 distribution to no later than December 31st to send checks  
10 out by December 31.

11 We think that that's -- we don't think that a  
12 reserve was required. We think that this would address,  
13 though, the concerns and would cut down on the  
14 administrative burden of doing two calculations for a short  
15 period of time. We think the week gives an opportunity for  
16 parties to feel, if they want to meet the debtors, if the  
17 debtors ask or make another proposal, they can do so.

18 Lastly, I think I just want to say it is the  
19 debtors' expectation that not all of these claims will be  
20 reconciled. These claims were categorized as such, because  
21 the variance between the asserted amount and the debtors'  
22 estimate was significant. We're optimistic, though, and  
23 open-minded, and to the extent claims can be reconciled and  
24 allowed in, they will be included in the first distribution.

25 To the extent they can't, because the information

1 can't be reconciled and the information can't be gotten from  
2 Transform or there are legal issues, then they will be put  
3 into the second round. They will get the benefit of  
4 receiving distributions understand the settlement proposal  
5 in advance of the effective date of the plan. They will get  
6 80 percent of their allowed amount, rather than 75.

7 One other data set that Your Honor may find useful  
8 -- with respect to the claims that were allowed, you know,  
9 in our proposal that we filed on the docket, \$64 million of  
10 allowed claims, the total amount that was asserted in those  
11 was roughly \$71 million. So relatively close in number, and  
12 that's where we were working.

13 In terms of the claims that we're talking about  
14 now, the pool that we had basically shifted all into Zone 2  
15 or Batch 2, I think there's roughly \$86 million asserted,  
16 and the debtors' estimate is that, you know, it'  
17 s no more than roughly \$23 million. So there's a much  
18 greater discrepancy as it currently exists. We're open to  
19 reconciliation. The claimants may be right, but the books  
20 and records don't reflect that. So there's a difference  
21 between roughly 90 percent match and 27 percent being -- you  
22 know, there's a 27 percent -- is what we think these claims  
23 will come down to.

24 So, Your Honor, I'm obviously happy to answer any  
25 questions, and I hope that this proposal, which took some

1 very arms' length negotiation between the debtors and the  
2 creditor participants -- and by those, I mean, those  
3 represented by the Foley Group. You know, we think this  
4 represents a substantial step forward to address your  
5 concerns.

6 THE COURT: Okay. I do have a couple questions.  
7 First, in terms of the people who would be covered by this  
8 program or this change to the program, would it include  
9 people who were requested of information, which is -- and  
10 provided a response, who the debtors are not paying because  
11 of an open issue on a legal basis?

12 MR. FAIL: It includes all ballots that were  
13 received timely that were not included in the allowed, and  
14 it does not include the duplicates. We could provide -- you  
15 know, I guess we can attempt --

16 THE COURT: No, no, I --

17 MR. FAIL: It doesn't include duplicates. It  
18 doesn't include -- yes is the answer, Your Honor.

19 THE COURT: The answer is yes?

20 MR. FAIL: Yes, it is.

21 THE COURT: So --

22 MR. FAIL: It includes the legal issues, in other  
23 words.

24 THE COURT: Let me ask it a different way. The  
25 debtors didn't, on their own, conclude that this was a claim



1 that was asserting something that they disagree with on a  
2 legal basis and because of that, didn't ask for information?  
3 You asked for information of everybody?

4 MR. FAIL: We asked information of everybody.

5 THE COURT: Got it.

6 MR. FAIL: And we will give everybody that timely  
7 filed and that has responded to us --

8 THE COURT: Other than the duplicates?

9 MR. FAIL: -- other than the duplicates.

10 THE COURT: Okay. And the timely response, again,  
11 is by the deadline, which would have been either November 23  
12 or December 1?

13 MR. FAIL: Correct, Your Honor.

14 THE COURT: Depending on whether it was the first  
15 mailing or the second?

16 MR. FAIL: Correct, Your Honor.

17 THE COURT: Okay. So I would suggest just one  
18 change to that, and I would hope that you would be able to  
19 do this and devote the people to it. Make it the end of the  
20 day Monday, the 16th, so that there's a week.

21 MR. FAIL: They will go out on a rolling basis, to  
22 the extent we can, we're fine. Yep, we will do our very  
23 best to get as many out by Monday as possible.

24 THE COURT: Okay, all right. Okay. And I just --  
25 you know, you should staff up for that week. I'm just

1 saying you should -- I mean, I think that's part of this.

2 MR. FAIL: Understood, Your Honor.

3 THE COURT: Whether it's on a --

4 MR. FAIL: And to the extent that --

5 THE COURT: -- the consultants side or the debtors  
6 side. You should be --

7 MR. FAIL: To the extent that the resources are  
8 those that are constrained by the debtors, but, of course,  
9 Your Honor, we've been dedicated to this --

10 THE COURT: Look, obviously, you cannot -- you are  
11 somewhat constrained by the fact that Transform has  
12 information, but in terms of being accessible for settlement  
13 proposals and the like, I think there should be extra people  
14 there. I mean, even if they're junior people with not much  
15 authority. I don't want the situation where the phone's  
16 ringing and then it just goes to an answering machine and  
17 then it, you know, just sits there. So this should be a  
18 busy week.

19 MR. FAIL: Understood, Your Honor.

20 THE COURT: Okay, all right.

21 I'm happy to hear people on this, but I do want to  
22 give you my view on the program. The program does have the  
23 30-day reconciliation in it, but I don't believe that is  
24 tied to the initial distribution. In fact, I think that's  
25 made clear by the fact that the 30-day reconciliation also

1 applies to people who opted out. It's just not tied to the  
2 distribution. The distribution's tied to the dates.

3 On the other hand, I think it is important to have  
4 additional time and resources devoted to responding to the  
5 people who provided the information timely so that there's a  
6 chance to cover those people, and it just seems to me that  
7 that didn't happen and that it should happen. It probably  
8 didn't happen because there was such a large response, and  
9 I'll note that the program is amendable on written consent,  
10 not to be unreasonably withheld, and I believe that  
11 withholding consent to what's just been proposed would be  
12 unreasonable.

13 MR. FAIL: Appreciate that, Your Honor. I'll cede  
14 the podium.

15 THE COURT: Okay.

16 Hi, Your Honor. Salah Hawkins, Cravath, Swaine &  
17 Moore, for administrative claimants Stanley Black & Decker.  
18 I don't intend to be long, Your Honor, or argue anything. I  
19 think the debtors' proposal addresses many of the concerns  
20 that my client had. Just a clarifying question with regard  
21 to the December 1 date. And so, if counsel can answer it.

22 Is it that the December 1 date is the receipt of  
23 the ballot from the second bath?

24 THE COURT: No, it's the receipt of the response  
25 to the information request.

1 MR. HAWKINS: Okay. And the reason why I raise  
2 that question, Your Honor, is because some, like my client,  
3 didn't receive the request for information until the 1st.  
4 So then --

5 THE COURT: Well, I --

6 MR. FAIL: That's the point.

7 THE COURT: What?

8 MR. FAIL: He filed his -- he submitted his ballot  
9 on what? The last day, November 25th.

10 But you received your mailing like a month before  
11 that, right?

12 THE COURT: Okay. Look, I mean, the plan -- I'm  
13 sorry. The consent program says that the distribution will  
14 be made on or about December 1, and that date's important.  
15 There's some play in it, but I think anyone who sends in the  
16 ballot, you know, less than a week before December 1 has to  
17 expect, when reading this order, that it's highly unlikely  
18 that there will be consensual agreement in those couple of  
19 days, and so, you know, that's just -- I think that's just a  
20 given.

21 MR. HAWKINS: I understand that, Your Honor.

22 THE COURT: Yeah.

23 MR. HAWKINS: Nevertheless, if the December 1  
24 cutoff date for the RFI is the response date and the people  
25 that received the second mailing, it doesn't seem feasible

1 to me that that's enough time for them to provide a response  
2 to the RFI.

3 THE COURT: Well the second mailing, I think,  
4 would be -- you know, the on or about would be basically  
5 assumed to be December 7th or 8th, I think. You know,  
6 basically, they gave an extra week, and so, there'd be an  
7 extra week. That's why it's on or about, but once you get  
8 beyond that, --

9 MR. HAWKINS: So the RFI -- so if you were in the  
10 second round, then the RFI would need to be responded to by  
11 December 7th or 8th?

12 THE COURT: No, no, no.

13 MR. FAIL: No, December 1.

14 THE COURT: No, December 1, because you can't  
15 respond on the day that the distribution is assumed to be  
16 made and assume that you're going to have a reconciled  
17 claim. It's not possible.

18 MR. HAWKINS: Agreed, Your Honor. I think that's  
19 part of it, but I think another part of the issue is that  
20 the heart of the agreement was that that would be expedited  
21 reconciliation.

22 THE COURT: I disagree with that. That is an  
23 important portion of the agreement.

24 MR. HAWKINS: Yes.

25 THE COURT: But it is not tied into making the

1 first distribution, because expedited reconciliation applies  
2 to the people who opted out, too, and the people who were  
3 not agreed to in time. I mean, it's the same 30 days.

4 MR. HAWKINS: I agree with that, Your Honor. The  
5 issue, I believe, here just goes back to the fact of not  
6 having a response as to knowing whether or not there was an  
7 agreement or not.

8 THE COURT: Well, but it's not reasonable to  
9 assume that, if you get your ballot in less than a week  
10 before the deadline, you're going to have agreement. I  
11 think that's the parties' risk. You know?

12 MR. HAWKINS: Understood, Your Honor.

13 THE COURT: I mean, I think that reading these  
14 procedures, I think people took the risk, that they would  
15 not have an agreed allowed claim on or about the December 1  
16 date if they sent in their ballot with less time than is  
17 need to do that, and it's clearly not going to be given 30  
18 days, because that would be beyond the on or about December  
19 1 date.

20 MR. HAWKINS: That makes sense to me, Your Honor.  
21 I think that there is just the tension there with the  
22 expedited reconciliation versus the receipt of the  
23 information, and I understand Your Honor's ruling to be  
24 going toward the side of the December 1 date is more  
25 important.

1 THE COURT: Yeah, yeah, I mean, I looked at this  
2 carefully. There is a requirement to try to complete the  
3 reconciliation process within 30 days of the receipt of the  
4 ballot, but that applies even to people that are not going  
5 to be getting the distribution on December 1.

6 MR. HAWKINS: Agreed, Your Honor, but the --

7 THE COURT: It applies to folks who are getting  
8 the second distribution. So --

9 MR. HAWKINS: The way that it reads in the  
10 solicitation itself, not only in the conformation order, but  
11 in the initial solicitation -- the way it read was the  
12 treatment of your claims you had a certain date by which you  
13 had to opt in, right? So that original date was the 18th.  
14 And then that date got pushed out to the 25th.

15 THE COURT: Right.

16 MR. HAWKINS: So under the terms of the  
17 solicitation, the debtors themselves were saying if you get  
18 your information in by the 25th, they foresaw that you would  
19 still be in that initial distribution.

20 THE COURT: No.

21 MR. HAWKINS: I think looking at it --

22 THE COURT: They didn't. It's possible that you  
23 would be, but if there were reconciliation issues, you would  
24 not be. I mean, again, --

25 MR. HAWKINS: But, Your Honor, I think honestly

1 then that makes the date misleading.

2 THE COURT: The notice is prefaced by saying  
3 consensual reconciliation of the allowed amount to be  
4 completed within 30 days from the receipt of the opt-in  
5 ballot, but, A, it has to be consensual. So you can't  
6 assume that they're going to agree, and, B, it's physically  
7 impractical to do consensual resolution within the 30 days  
8 in order to make the December 1, or on or about December 1,  
9 payout. So it's really you have to construe them as two  
10 different things. They're going to speed the resolution,  
11 and conceivably, if something is a no-brainer, they'll agree  
12 to it so that they can get into the first distribution, but  
13 the next clause said holders who do not agree with the  
14 debtors shall be deemed to hold a non-opt-out settlement  
15 admin. Claim.

16 MR. HAWKINS: I agree with that, yeah, but I think  
17 the tee there is the holders who do not agree with the  
18 debtors, and there was no information as to whether or not  
19 there was agreement.

20 THE COURT: All right.

21 MR. HAWKINS: So if you're looking at --

22 THE COURT: But that's fine, but again, I don't  
23 think people should have had the reasonable expectation  
24 that, if they didn't response a week before December 1, if  
25 they're in their first mailing, or on December 1, if they



1 were in the second mailing, would ever come close to having  
2 a right to be in the first one. It's just not drafted that  
3 way.

4 MR. HAWKINS: Yeah, if I may clarify, Your Honor?  
5 So is it that you believe, even though the date was extended  
6 to be the 25th, it wasn't reasonable for anyone to rely on  
7 that 25th date to be included in the resolution?

8 THE COURT: No, I --

9 MR. HAWKINS: It seems to make the date  
10 irrelevant.

11 THE COURT: No, the date of the ballot, but not  
12 the -- no one changed the distribution date. No one's  
13 changed the on or about December 1 date. And so, I don't  
14 think they --

15 MR. HAWKINS: Well, in reality, Your Honor, they  
16 did, right? There wasn't a distribution that went out on  
17 the 1st. There wasn't a distribution that went out a week  
18 after the 1st.

19 THE COURT: That's fine. We could just be doing  
20 that one forever. We have to base this on reasonable  
21 expectations. I think if someone is supposed to reply on  
22 the 25th with their ballot and there's been no change to the  
23 date -- I mean, the debtors didn't say we're going to move  
24 the date, right?

25 They didn't say it. So it's still on or about the

1 7th, and if you extend this, as you're suggesting, we're  
2 going to get into January, and that's way beyond the 7th. I  
3 think this is appropriate.

4 I mean, if you think about it, if you're going to  
5 be sending it in that close, you run the risk. It may work.  
6 It may be simple enough so that you can get it, but you run  
7 the risk that there won't be agreement, and this is tied to  
8 there being agreement. That's the way it's worded. The  
9 debtors could say we don't agree, period.

10 MR. HAWKINS: I think that's fair, Your Honor, but  
11 I think they do have an obligation prior to the distribution  
12 of saying we don't agree.

13 MR. FAIL: We've said it.

14 THE COURT: They did.

15 MR. FAIL: We rejected it.

16 THE COURT: They did, and I'm making them go over  
17 it to make sure.

18 MR. HAWKINS: Yeah, and I think that's the  
19 tension.

20 THE COURT: There's, basically, another two weeks  
21 process.

22 MR. HAWKINS: Yeah, I think that was the tension  
23 was they made the decision, but that decision wasn't  
24 communicated.

25 THE COURT: Well, I think it's evident. I mean,

1 it's evident to me today that this is a fair resolution of  
2 that. I appreciate some creditors either got a head start,  
3 or alternatively, had more simple claims, but that's baked  
4 into this. If you have a really difficult claim, it's  
5 pretty unlikely that you're going to fit in.

6 So if someone buys a difficult claim or a claim  
7 that has some hair on it, you know, that's a risk they take.  
8 I'm assuming that, for these, if the claim wasn't difficult,  
9 then it was easy for them to respond by the deadlines that  
10 are set forth herein, i.e., within a week of filing the  
11 ballot and that it could be resolved in a week. So there  
12 you have the two weeks.

13 MR. HAWKINS: Understood, Your Honor.

14 THE COURT: So you know, I think this is a proper  
15 adjustment.

16 MR. HAWKINS: Thank you, Your Honor.

17 MR. BASS: Your Honor, this is David Bass, from  
18 Cole Schotz, regarding representing Lifetime Brands. Your  
19 Honor, you're reading seven-day provision -- seven days that  
20 don't exist within documents that were mailed out and to  
21 which parties were given notice, even when they requested  
22 the information, they didn't say provide it within seven  
23 days. There was no deadline. So you're reading out a  
24 provision that deals with a 30-day reconciliation period --

25 THE COURT: No, look, sir, I'm not going to hear

1 15 people make the same argument. I will say it one more  
2 time, and you're not going to persuade me otherwise. The 30  
3 days review is quite clear in these papers it is separate  
4 and apart from making the distribution. It's a separate  
5 provision, and that's made abundantly clear on page 28 of  
6 the confirmation order, where the 30-day review applies to  
7 people who aren't included in the first distribution as  
8 well.

9 The distribution is made on or about December 1.  
10 So anyone who got this notice and realized that the only  
11 claims that would be paid in the first distribution are ones  
12 that, A, opted in and, B, that were agreed or allowed, would  
13 know that they ran the risk that, if their claim -- which  
14 they wouldn't know when they made the ballot -- is going to  
15 be allowed or not, they run that risk. And so, it's fair if  
16 the debtors just basically stopped responding and still have  
17 responses to make to extend it briefly to let that happen,  
18 if people were engaged in that process. But if people  
19 didn't respond or just sat back and thought that they'd have  
20 30 days and the December 1 distribution wasn't going to  
21 happen, they just didn't read this right. I'm sorry, and  
22 I'm not going to hear this over and over again.

23 I've reviewed it, and I believe that's the way it  
24 works. You know, those --

25 MR. BASS: We're not in this --

1 THE COURT: -- who consensually agree are the ones  
2 who get it, and those who do not agree do not get the  
3 distribution, and if the distribution --

4 MR. BASS: But --

5 THE COURT: -- is to be on or about December 1.  
6 So maybe if you send it --

7 MR. BASS: Your Honor, --

8 THE COURT: Excuse me.

9 MR. BASS: (Indiscernible).

10 THE COURT: Excuse me. If you send in your ballot  
11 on December 23, you're running a risk that there will be too  
12 much hair on the claim for you to fit in here. It may be  
13 that they're comfortable with your claim and you do fit in,  
14 but the 30 days is a separate requirement applying to a  
15 general reconciliation process. It doesn't tie into the  
16 distribution, because it can't. The numbers don't fit.

17 MR. BASS: But that was never expressed.

18 THE COURT: It's in the order. I just read it.  
19 Anyone could read it. It's right there. You read the  
20 order. You read pages 27 and 28. It's an inescapable  
21 conclusion, as it is in the notice, which I've just read,  
22 and I'm not going to go over it again.

23 Do you have anything other than that,

24 Mr. Weintraub?

25 MR. WEINTRAUB: I'm thinking better of it, but I'm

1 going to plow ahead --

2 THE COURT: Okay.

3 MR. WEINTRAUB: -- anyway, Your Honor.

4 THE COURT: All right.

5 MR. WEINTRAUB: I'm in a slightly different  
6 bucket, Your Honor. I'm not going to quibble about the 30  
7 days. What happened with us -- and I know you don't want to  
8 hear 5,000 stories, but what happened with us was we filed a  
9 request for administrative payment on November 18th. We  
10 were told we needed to file a ballot. We didn't get the  
11 ballot until the 19th. I think it was Mr. Singh who gave us  
12 to the 19th to file the ballot.

13 We filed the ballot. So the debtor had all of the  
14 information. There was information requested on the 21st.  
15 It was provided on the 26th. So we provided the information  
16 well in advance, in the scheme of things, of December 1.

17 We never heard back. The only thing we saw after  
18 that was the schedule, which we were not on when the  
19 schedule of scheduled payments was filed with the Court. We  
20 would like the opportunity to agree to agree or disagree.  
21 We were never given that opportunity between November 26th  
22 and December 1st to say okay, we'll, you know, reduce the  
23 claim. We're okay. This is why you're wrong.

24 The other thing, Your Honor, is it's my  
25 understanding that we filed all of the information that was

1 then requested of us again on November 21st back on November  
2 19th, with the exception that there was a request for the  
3 90-day payments. We have an administrative claim, Your  
4 Honor, and we're a service provider. So we don't have a  
5 503(b)(9) issue under AIMS (ph). The fact that there may be  
6 a preference is not a defense to the administrative claims.  
7 So the information they requested on the 21st that we  
8 provided on the 26th was really extraneous to whether or not  
9 we can have an allowed claim. So I would just like to not  
10 be forced out of the queue --

11 THE COURT: Well, all right. Let me back up. It  
12 seems to me that I have been assuming, perhaps incorrectly,  
13 that the quest for information was filed the day after the  
14 ballot was filed. I think if there's a response to a  
15 request for information within a week of the request having  
16 been made, they should fit into this group. That may not be  
17 the 23rd.

18 For Mr. Weintraub's client, it's a day or two  
19 after that.

20 MR. WEINTRAUB: it would be November 19th.  
21 November 26th would be exactly when --

22 MR. FAIL: Your Honor, for a \$10,000 with an  
23 exceptional circumstance that no one knew of your client,  
24 and yet you took more time to respond.

25 MR. WEINTRAUB: I don't even understand what was

1 just said, Your Honor. So I --

2 THE COURT: Well, the ballot --

3 MR. FAIL: This deal was just cut after several  
4 hours of negotiation based on these numbers, and now --

5 THE COURT: But that -- I think what's being said  
6 is that --

7 MR. FAIL: \$10,000 to flip this around.

8 THE COURT: -- your client was not on the list  
9 originally as an administrative expense claim?

10 MR. FAIL: That's what he's saying.

11 MR. WEINTRAUB: No, no.

12 MR. FAIL: We're not here to argue your claim.

13 MR. WEINTRAUB: That's --

14 MR. FAIL: We don't have the data. I don't agree  
15 with this. I don't have any clue or record as to whether --

16 MR. WEINTRAUB: Your Honor?

17 THE COURT: No, but --

18 MR. FAIL: -- his \$10,000 was on the list.

19 THE COURT: But I guess what I'm saying is why is  
20 it December 23rd as opposed to 1 week after the information  
21 is requested, as long as the ballot was filed timely?

22 MR. SINGH: I think, Your Honor, --

23 MR. FAIL: That's working backwards.

24 MR. SINGH: Well, yeah, we're just working  
25 backwards, right? So just if you ignore for a second the



1 second notice, because I think it's complicates it a bit.

2 THE COURT: Yeah, I'm just focusing on the --

3 MR. SINGH: Yeah, so if we were to actually make a  
4 distribution on December 1st, we would have needed to have  
5 really -- that's the Thanksgiving break, but we would have  
6 really realistically needed to have a reconciled claim, I  
7 think, based upon your comments earlier, a week before. So  
8 when we were in the room back there, when we were sort of  
9 coming up with the information, we worked our way back a  
10 week before, which gets you to November 23rd. And so, we  
11 said look, if there is somebody that falls into a population  
12 where, you know, they're sort of waiting on an answer from  
13 us but had responded by the 23rd, they theoretically could  
14 have actually been reconciled in time during that week of  
15 November 23rd to December 1st to actually participate in the  
16 distribution. And so, that's the reason we picked the 23rd  
17 and not, you know, 7 days from a particular issue. And  
18 really, one of the reasons, Your Honor, is part of this  
19 process was people were encouraged to sign up early, right?

20 I mean, we literally got emails and ballots.  
21 People said I don't even need the ballot the day after the  
22 confirmation hearing. Here's my information. Here's what  
23 I'm ready to do. And so -- because I think they recognized  
24 that December 1st was a real date. So I don't recall Mr. --  
25 I have no reason to --

1 THE COURT: When did the --

2 MR. SINGH: -- believe what Mr. Weintraub's saying  
3 is not true.

4 THE COURT: When did the notices go out?

5 MR. SINGH: October 18th. So it's 30 days and  
6 October --

7 US: October 16th and October 23rd.

8 MR. SINGH: Oh, we added three days for mailing.  
9 Sorry.

10 THE COURT: All right.

11 MR. SINGH: So that's why we picked the 23rd and  
12 why, for the second distribution, it's December 1st.

13 MR. FAIL: It's all inclusive. Some people had  
14 much more time, but the whole point is if you waited, you  
15 waited.

16 THE COURT: All right. That's fine.

17 MR. WEINTRAUB: Your Honor, I really want to  
18 respond to this, please.

19 THE COURT: Okay.

20 MR. WEINTRAUB: What I just heard was a back room  
21 deal was made in that room, where I was not admitted, where  
22 people --

23 THE COURT: Well, no, I understand that, but I --

24 MR. WEINTRAUB: Your Honor, where people decided  
25 that December 23 was going to be the drop-dead date.

1 THE COURT: Right.

2 MR. WEINTRAUB: What I am saying is that we would  
3 have filed our claim timely. We would have filed it on  
4 November 18th, but the debtor didn't give us the ballot. We  
5 filed the ballot on November 19th. November 19th. We did  
6 not get a request for information until November 21st. We  
7 responded back --

8 THE COURT: Well, why did you ask for the ballot?

9 MR. WEINTRAUB: Because we didn't get a ballot.

10 MR. FAIL: So the first ballot deadline was  
11 November 18th. The debtors were inundated with the  
12 thousands that we went -- with the hundreds that we went  
13 over with the people that timely responded. He then asked  
14 for a ballot, and it came in later, and the debtors  
15 processed it later. And in processing it later, they  
16 realized we have no information and give us more  
17 information.

18 THE COURT: So I mean, I think that explains the  
19 difference in the days.

20 MR. WEINTRAUB: It's one day.

21 THE COURT: Right, I understand, but --

22 MR. WEINTRAUB: And the notion that -- we filed an  
23 administrative claim on August 14th. I understand thousands  
24 of claims were filed. Nobody looked at the docket. I  
25 understand that, but the notion that we were asleep --

1 THE COURT: But if they filed a misread claim,  
2 they should have gotten notice, right?

3 MR. SINGH: Yes.

4 THE COURT: All right. So they filed it --

5 MR. WEINTRAUB: And --

6 THE COURT: So there's no reason why it shouldn't  
7 have been in earlier.

8 MR. WEINTRAUB: Your Honor, it was in -- it would  
9 have been in by the 18th, but they didn't send us the ballot  
10 until the 18th. So we filed it on the 19th with their  
11 consent. One day. One day, and I'm willing -- I'm not --  
12 please, Your Honor.

13 THE COURT: I'm not going to change these numbers.  
14 Look, if there's some reason that the debtors actually  
15 didn't -- a bad reason that they didn't get you the ballot  
16 on time, then I imagine they'll consider this.

17 MR. WEINTRAUB: I'm --

18 THE COURT: But I --

19 MR. WEINTRAUB: -- not quibbling with that part of  
20 it.

21 THE COURT: I'm not going to decide those issues  
22 now.

23 MR. WEINTRAUB: Your Honor, I'm not quibbling with  
24 that part of it. What I'm quibbling with is why is November  
25 23rd, as opposed to November 26th, the date by which people

1 are put into the penalty box?

2 THE COURT: Because people are not going to  
3 reconcile 13,000 -- I'm sorry. They're not going to  
4 reconcile 500 claims in 3 days. It's not going to happen,  
5 and that wasn't what was supposed to happen.

6 MR. FAIL: And the files have to be locked down.

7 MR. WEINTRAUB: Your Honor?

8 MR. FAIL: You can't send out checks on the day  
9 that you reconcile them. You need time.

10 THE COURT: It's just not going to -- I mean,  
11 that's not the way it's worded.

12 MR. WEINTRAUB: Your Honor, if Counsel would stop  
13 interrupting and double-teaming. No one ever said that they  
14 needed a week to process checks.

15 THE COURT: No, but I understand that, but I think  
16 that's a risk that people assume. I mean, --

17 MR. WEINTRAUB: That's completely --

18 THE COURT: -- you read this --

19 MR. WEINTRAUB: It's not a matter of assuming a  
20 risk, Your Honor. It's a matter of basically a shell game.

21 THE COURT: No, it's not.

22 MR. WEINTRAUB: We provided the information that  
23 they had requested on November 26th.

24 THE COURT: Yes.

25 MR. WEINTRAUB: If someone had called and said,

1 "Would you reduce your claim by X?" we might have had a  
2 consensual deal. They never tried to even have a consensual  
3 deal.

4 What the protocol talks about is people who do not  
5 consent. Well, you have to be talked to, to be able to  
6 consent or not consent. There was no disagreement. As far  
7 as we knew, we sent them the information. No one followed  
8 up. No one called us.

9 THE COURT: Look, I'm assuming that if you make a  
10 proposal to them that makes sense, you'll fit in. Okay?  
11 But I'm not going to -- I don't -- I'm really not inclined  
12 to tinker with this.

13 MR. WEINTRAUB: I understand. But how do I make a  
14 proposal when nobody has told me that --

15 THE COURT: No.

16 MR. WEINTRAUB: -- my claim is not agreeable?

17 THE COURT: Just make the proposal.

18 MR. WEINTRAUB: You mean now?

19 THE COURT: Yes.

20 MR. WEINTRAUB: I need to know what the dispute  
21 is. I don't think there's a dispute.

22 UNIDENTIFIED SPEAKER: This is a \$10,000 claim. I  
23 think we're spending more time --

24 MR. WEINTRAUB: It's a \$49,000 claim, and it's the  
25 principle of the thing. I was at home with my grandson. I

1 ended up here all day.

2 THE COURT: So make a proposal. But I really  
3 don't think -- look, again, if you look at this, there is --  
4 yes, there is some obligation of the debtors to proceed with  
5 this, and just not to turn everybody down who makes the  
6 election. But I don't think the debtors have done that.

7 What I do think has happened is that there was  
8 basically a period where the debtors asked for information.  
9 People provided the information within a reasonable time,  
10 and the debtors didn't respond within a reasonable time. I  
11 think a week before the payout date is a reasonable time.

12 If for some reason someone didn't get a ballot  
13 when they should have or something like that, you can  
14 contact them, lay that out with them, make a proposal, and  
15 they should review it. But I don't want to just expand the  
16 universe for everybody because I'm assuming that didn't  
17 happen to everybody.

18 MR. WEINTRAUB: Your Honor, we didn't get the  
19 ballot when we should have gotten one.

20 THE COURT: I just said that to you. I said to  
21 you --

22 MR. WEINTRAUB: Right.

23 THE COURT: -- if you actually didn't get the  
24 ballot when you should have, say that to them. And I'm  
25 telling them right now, if you actually show that that

1 didn't happen, then they should look at it.

2 MR. WEINTRAUB: Okay. Because --

3 THE COURT: But that's going to be a distinct  
4 minority of people.

5 MR. WEINTRAUB: I understand that, but we  
6 shouldn't discriminate against the minority.

7 THE COURT: So I'm not going to change the -- I'm  
8 not going to change the whole deadline, just assuming that  
9 everyone is going to be able to say we didn't get the  
10 ballot.

11 MR. WEINTRAUB: Well, we know we didn't get the  
12 ballot, because they conceded that when they gave us the  
13 extension.

14 THE COURT: All right. I think you're probably  
15 the exception.

16 MR. WEINTRAUB: And we didn't doddle. We got it  
17 in the next day. And they had the information. That's my  
18 big point, Your Honor, is they have the information.

19 THE COURT: I don't know that. I don't know  
20 whether they did or not.

21 MR. WEINTRAUB: Okay. I'm --

22 THE COURT: Again, it says if there's a response -  
23 -

24 MR. WEINTRAUB: -- representing to the Court they  
25 did.



1 THE COURT: -- then they have it. If you can say  
2 to them, "We already sent this to you," then you have timely  
3 responded.

4 MR. WEINTRAUB: Exactly. It's dilatory to ask me  
5 for the same information.

6 THE COURT: So you're within it. So you're within  
7 their proposal.

8 MR. WEINTRAUB: But -- except they're saying the  
9 23rd is the cutoff, and we responded on the 26th, but it --

10 THE COURT: But you say you've already responded.  
11 So you -- that's what you say to them.

12 MR. WEINTRAUB: Okay.

13 THE COURT: "I already responded. You didn't have  
14 to ask me a second time, because I had already given it to  
15 you." I think there are probably a couple other people who  
16 are probably going to be in that boat.

17 MR. WEINTRAUB: I'm fine with that. If --

18 THE COURT: Okay.

19 MR. WEINTRAUB: -- you'll stipulate that you have  
20 the information from --

21 THE COURT: They don't know that. They don't know  
22 it.

23 MR. FAIL: We're not stipulating to anything right  
24 now.

25 THE COURT: They don't know that. There's 250

1 people -- 250 claimants. They don't know which one falls  
2 into that boat.

3 MR. WEINTRAUB: I'll speak with counsel, Your  
4 Honor.

5 THE COURT: The notice will say, "If you didn't  
6 respond by November 23rd or December 1, having made a timely  
7 election, then" -- well, it's the other way around. "If you  
8 did timely respond, and you've made a timely election, then  
9 you have this extra period." I think it doesn't take much  
10 thought to say, "Well, we did respond the first time. You  
11 just asked us for duplicates."

12 MR. FAIL: And, Your Honor, the way this is going  
13 to work, if it's going to work at all mechanically, we're  
14 logging the responses that came in. If -- distributions are  
15 going to go out the door based on that. We'll look into  
16 this one circumstance. We'll either make an arrangement or  
17 we won't for a \$50,000 claim. I'm sure we'll be very  
18 reasonable.

19 But to now say we have to go back and search  
20 histories to see what was done --

21 THE COURT: No, you don't.

22 MR. FAIL: -- we cannot do that.

23 THE COURT: You don't, but I'm assuming if someone  
24 gets this and says, "Well, wait a minute. I gave them all  
25 the information the first time, and they just ignored it and

1 asked it for me again." Then they'll send that to you, and  
2 you'll look at that, and you'll review it.

3 MR. FAIL: Of course.

4 THE COURT: Yeah. Okay. So --

5 MR. WEINTRAUB: I can live with that.

6 THE COURT: Okay.

7 MR. WEINTRAUB: Thank you, Your Honor.

8 THE COURT: Okay.

9 UNIDENTIFIED SPEAKER: I'm not going to raise any  
10 issues. It seems clear. I just -- procedurally, the best  
11 way to go about if we have some -- so we're supposed to be  
12 getting information back on the --

13 THE COURT: 16th or 17th.

14 UNIDENTIFIED SPEAKER: -- 16th or 17th. Is there  
15 -- do we wait and see if we hear and then reach out?

16 MR. FAIL: Yeah. You wait and hear until you --  
17 you wait to see if you hear it. That's --

18 UNIDENTIFIED SPEAKER: And then if I don't hear --

19 THE COURT: Wait, on the 16th or 17?

20 UNIDENTIFIED SPEAKER: And then if we don't hear,  
21 reach out to you and try and figure out what's going on?

22 MR. FAIL: Sure. That sounds like a wonderful  
23 plan.

24 THE COURT: Okay.

25 UNIDENTIFIED SPEAKER: You know --

1 THE COURT: But no, no, wait, wait, wait. No, no,  
2 wait. I --

3 UNIDENTIFIED SPEAKER: -- Mr. Fail, with all due  
4 respect --

5 THE COURT: No, I think -- this is a -- I'm  
6 assuming everyone will hear, except people that filed  
7 duplicate claims on the 16th or 17th. So there shouldn't be  
8 much of a reason to reach out.

9 MR. FAIL: The parties that will hear are those  
10 parties that we articulated, with timely ballots --

11 THE COURT: Yes, all right.

12 MR. FAIL: I mean --

13 THE COURT: So if --

14 MR. FAIL: No one else will hear.

15 THE COURT: -- you're not in that group, or if  
16 maybe you're in Mr. Weintraub's position -- let me finish.

17 UNIDENTIFIED SPEAKER: Sure.

18 THE COURT: If you haven't heard on the 16th or  
19 17th, hopefully on the 16th, then I guess you need to assume  
20 that you didn't fall into this group. If you think you do,  
21 you should get back right away.

22 UNIDENTIFIED SPEAKER: Right. That's my question  
23 is --

24 THE COURT: And frankly, if you think you're in  
25 Mr. Weintraub's situation, you should get back before then.

1 UNIDENTIFIED SPEAKER: No, I'm not in Mr.  
2 Weintraub's situation.

3 THE COURT: Okay. All right. And -- but I think  
4 it, at that point, if you've gotten the information, it's  
5 really incumbent to get back right away also. Don't wait  
6 until the last day -- don't wait until, you know, the 22nd.

7 UNIDENTIFIED SPEAKER: I'm not disagreeing, Your  
8 Honor. I'm --

9 THE COURT: I'm speaking for people on the phone.

10 UNIDENTIFIED SPEAKER: I'm just saying that I have  
11 one client in particular who claimed that they sent in a  
12 ballot that would -- or not a ballot, a response that would  
13 be timely under these circumstances, and has not heard back.  
14 So I'm just --

15 THE COURT: Well, they may -- they might want to -  
16 -

17 UNIDENTIFIED SPEAKER: Should I wait?

18 THE COURT: They might want to be proactive.

19 UNIDENTIFIED SPEAKER: That's all.

20 THE COURT: I don't know. Again, if they're in  
21 Mr. Weintraub's situation --

22 UNIDENTIFIED SPEAKER: They're not.

23 THE COURT: Well, he's -- if they sent it in and  
24 they're saying it was ignored, then they are, because he's  
25 basically saying when he provided the information the first

1 time, it was ignored.

2 UNIDENTIFIED SPEAKER: Right. Okay. I  
3 understand.

4 THE COURT: So I think --

5 UNIDENTIFIED SPEAKER: And that's what I'm asking  
6 is who would we reach out to?

7 THE COURT: If someone thinks they provided the  
8 information the first time, and the request for a response  
9 was really a duplicate of what was already -- it doesn't ask  
10 for anything new, they should probably be proactive on that  
11 point.

12 UNIDENTIFIED SPEAKER: Well, I just -- they  
13 responded to the e-mail from M3. This is what they are  
14 telling me. I --

15 THE COURT: Yeah.

16 UNIDENTIFIED SPEAKER: -- have to verify it.

17 THE COURT: Right.

18 UNIDENTIFIED SPEAKER: I'm not -- that they  
19 responded to the information from M3 and then have not heard  
20 back.

21 THE COURT: Oh, well that -- no, then I think they  
22 should wait until the 16th or 17th.

23 UNIDENTIFIED SPEAKER: Thank you. That's all I'm  
24 asking.

25 THE COURT: Yeah, yeah. Okay.

1 UNIDENTIFIED SPEAKER: Okay. Thank you.

2 MR. GLASS: Your Honor, I'm sorry. I'm a little  
3 confused as to where I fit in. I think I fit into the  
4 group. We responded -- we gave our opt-in ballot on the  
5 14th of November. On the 19th of November, they asked for  
6 information. On the 19th of November, we provided all of  
7 the information.

8 THE COURT: It sounds like you're in the group.

9 MR. GLASS: It sounds like I'm in the group.

10 THE COURT: Right.

11 MR. GLASS: So now they're going -- I assume, and  
12 I'm sorry to make you repeat yourself, after you've done it  
13 so many times.

14 THE COURT: By the 16th or 17th, they're going to  
15 tell you what their issues are in shorthand --

16 MR. GLASS: Yes.

17 THE COURT: -- with what you provided. And you'll  
18 have a week to -- hopefully it will be done before then, to  
19 try to resolve those issues.

20 MR. GLASS: It seems like almost a truncated  
21 claims objection process or in a way --

22 THE COURT: No, no. It's not an objection. This  
23 is just to see if you can reach an agreement. It's just to  
24 reach an agreement. This is not on the merits. If you  
25 don't agree, you fall into the next group.

1 MR. GLASS: And we theoretically get --

2 THE COURT: Maybe you'll agree on that group, or  
3 it will be teed up for a hearing.

4 MR. GLASS: So we will have the opportunity to  
5 request a hearing to resolve it.

6 THE COURT: If you don't reach an agreement, yeah.  
7 If you don't reach an agreement.

8 MR. FAIL: You don't need to request a hearing.  
9 We are aware of all of the ballots. We have now counted  
10 them. We started with the 1206, and we've worked our way  
11 down. Those that are allowed are going to be paid, starting  
12 on the first distribution. The next round, we'll go  
13 forward, and we have to reconcile them. There's no need for  
14 anybody to file additional requests for allowance of claims.

15 THE COURT: It's only if you --

16 MR. GLASS: Well, I just don't want to miss the  
17 boat.

18 THE COURT: No, wait. It's only if you come to a  
19 place ever, whether it's in round one or round two, if you  
20 ever come to a place where you know you're not going to  
21 reach an agreement, then you could ask for a hearing,  
22 because -- then it's -- then you're never going to reach an  
23 agreement.

24 MR. GLASS: Okay. It just seems like -- that  
25 we're going to be -- that we're not going to -- that it's in



1 their unilateral power not to reach that agreement.

2 THE COURT: No. Look, it's written. It is  
3 actually written that way, but that's not what's expected.

4 MR. GLASS: Okay. That's not what --

5 THE COURT: What's expected here is the parties  
6 will make --

7 MR. GLASS: Understood.

8 THE COURT: -- a good faith effort to reconcile  
9 the amounts.

10 MR. GLASS: Then I have a -- and I know -- I don't  
11 know how to say this in an easy way, but I'm going to be out  
12 of the country starting tomorrow --

13 THE COURT: Well --

14 MR. GLASS: -- until the 21st.

15 THE COURT: -- it's mostly an accounting issue, I  
16 think.

17 MR. GLASS: Right. I do have a partner who can  
18 reconcile things.

19 THE COURT: Okay.

20 MR. GLASS: He's very good with numbers.

21 THE COURT: And they're they business people. I  
22 mean, if the accounting issue is just, you know, "When was  
23 this sent?" or, "My books don't show that," or, "We thought  
24 we paid this," you know, then not even a lawyer should be  
25 involved. A lawyer might get involved if the issue is, "Are

1 we going to try to settle one of these legal issues, like  
2 drop off, et cetera?"

3 MR. GLASS: Preference. And again, I always  
4 understand Ames to be that you can't offset preferences from  
5 administrative claims.

6 THE COURT: That's a separate issue.

7 MR. GLASS: Separate issue?

8 THE COURT: Separate issue.

9 MR. FAIL: All these folks, you're assuming that  
10 there was a detailed analysis and that we're making  
11 conclusions. We asked for preference exposure as data  
12 collection, and it is relevant for some 503(b) claims,  
13 maybe. That's another judicial decision. It's not before  
14 you.

15 We're going to send out the -- you'll know by  
16 Monday or Tuesday what we think.

17 THE COURT: One of the things that was complicated  
18 -- contemplated is the potential for a global settlement of  
19 claims with the parties. So people raise preference points  
20 not just as a general -- I'm sorry, not just as a focused  
21 point on the admin claim, but because people -- there were  
22 some people that wanted to resolve everything. You know,  
23 there were some people that had claims that might not even  
24 be 503(b)(9) claims or maybe were 503(b)(9)'s but maybe  
25 weren't, and then you take into account preference exposure,

1 and you wrap it all up.

2 So it's -- this really is intended to try to see  
3 if you could reach an agreement.

4 MR. GLASS: So if we don't reach an agreement,  
5 where are we by the 23rd?

6 THE COURT: Well, that's where we started with.  
7 As I read it, the debtors will continue to make an effort to  
8 reach an agreement. It may be that you know on the 23rd  
9 you'll never reach an agreement, in which case the amount  
10 will have to be fixed by me. But on the other hand, you may  
11 think, "Okay, we're getting close, but we're not there on  
12 the 23rd. I want to be in the next distribution."

13 And so, you know, we'll keep negotiating.

14 MR. GLASS: The fear is that there will never be a  
15 next distribution.

16 THE COURT: Well, I know that's the fear, but I  
17 don't think that's right. I mean, if that's the case, then  
18 the plan will never go effective.

19 MR. FAIL: What motive could we -- why would we  
20 possibly have that motive? It makes no sense.

21 THE COURT: Yeah. They have a great incentive to  
22 reach agreement.

23 MR. GLASS: No, I understand the motive is to go  
24 effective. I'm just thinking about the reality.

25 THE COURT: Well, that may be true and that's why

1 --

2 MR. GLASS: Which is a projection.

3 THE COURT: That's why there's --

4 (Simultaneous speaking)

5 MR. GLASS: It's a projection. I understand.

6 Respect with him.

7 THE COURT: That's why there's incentive to reach  
8 an agreement before the 23rd.

9 MR. GLASS: Understood.

10 MR. FAIL: The only facts are that we allowed more  
11 claims than we didn't allow today. But --

12 THE COURT: So I think -- look, I think -- I think  
13 that whenever there is a settlement calculation here, and  
14 there's a good reason to settle, and part of that is timing,  
15 people are going to try to figure out every angle of it.

16 And basically what's happening here is people are  
17 getting a little more time to do that. That's all it is.

18 MR. GLASS: Understood. I just have one more  
19 question with the duplicate question. Again, we were sent  
20 for one particular claim --

21 THE COURT: That's fine.

22 MR. GLASS: -- duplicate ballots.

23 THE COURT: But unless --

24 MR. GLASS: And we don't expect to be paid twice.

25 THE COURT: No, so don't worry about it.

1 MR. GLASS: Got it.

2 THE COURT: Okay.

3 MR. GLASS: Thank you very much.

4 THE COURT: All right. I guess it's conceivable  
5 that someone may actually have had two different customers  
6 at Sears and --

7 MR. FAIL: That did happen. Sears and Kmart. So  
8 we're either right or we're wrong. In this case, we were  
9 wrong. Another case, we were wrong the other way.

10 THE COURT: Right.

11 MR. FAIL: We'll figure it out in the claim's  
12 process, Judge.

13 THE COURT: Right, okay. I agree. Okay. So you  
14 have authority to implement this. I don't know if you have  
15 it in writing yet from the people that need to consent, but  
16 you've represented that you have their consent. And I'm  
17 saying that if they withheld it at this point, it would  
18 actually be unreasonable. So you can move ahead with this,  
19 and should just go ahead and do that.

20 UNIDENTIFIED SPEAKER: Thank you very much, Your  
21 Honor. We will.

22 THE COURT: Okay. I appreciate that a lot of work  
23 will be involved in a short period of time, but I really  
24 think it needs to be done. So just staff it up with some  
25 junior associates, field calls.

1 MR. FAIL: I'm glad that you ordered that, so it  
2 takes the pressure off of me, Your Honor.

3 THE COURT: M3 exempt.

4 MR. FAIL: It's -- this is your orders, not mine.  
5 So thank you.

6 UNIDENTIFIED SPEAKER: Your Honor, counsel for  
7 (indiscernible). And we didn't get -- we got an e-mail, but  
8 it didn't have a deadline in it. And we filed our ballots  
9 on the 17th. So there would be -- 30 days has not yet run.

10 THE COURT: Ma'am, I've already dealt with this 30  
11 day issue. It's a red herring. It is a red herring under  
12 the order. There is not a 30 day period after which the  
13 distribution should happen. That's not how the order works.  
14 The distribution is on or around December 7th.

15 UNIDENTIFIED SPEAKER: The order -- the ballot  
16 said that there would be a 30 day reconciliation period from  
17 the date the ballot was submitted.

18 THE COURT: Yes, but that isn't tied to the  
19 distribution.

20 UNIDENTIFIED SPEAKER: I understand that, Your  
21 Honor, but we also had already provided all of the  
22 information that was requested in the e-mail that was sent  
23 on the 17th.

24 THE COURT: Well, then you're covered. Then  
25 you're covered by this program, as I said to Mr. Weintraub.

1 This program assumes that there was a timely response. If  
2 there was a timely response, even if it was in the first  
3 information you sent, because they just asked for the same  
4 information all over again, just make the debtors aware of  
5 that fact.

6 UNIDENTIFIED SPEAKER: Well, it was with our proof  
7 of claim. That's why I'm asking, Your Honor. With all --  
8 all the information they asked for was with our proof of  
9 claim. So we were in the middle of an emergency discovery,  
10 which was a shortened discovery period and involved in  
11 depositions, and other matters. So you know, we didn't see  
12 a deadline in that e-mail. We had other things we had to  
13 attend to, and they already had all of this information they  
14 were requesting.

15 So -- but you're saying that we would be in the  
16 first group because of that, if that's --

17 THE COURT: I'm not saying that. I'm not saying  
18 that. You didn't tell me that the information you were  
19 referring to was in the proof of claim as opposed to the  
20 information that you gave them with this election. So I'm  
21 not going to --

22 UNIDENTIFIED SPEAKER: Well, there wasn't  
23 information requested with the election. And I assume you  
24 mean the ballot. The ballots, if you filed electronically,  
25 you could only do what was allowed with the electronic

1 filing (indiscernible) --

2 THE COURT: It has been represented to me that on  
3 the day after, or maybe the day after that, the ballot was  
4 filed, the debtors made requests of everyone for additional  
5 information. Are you saying that didn't happen?

6 UNIDENTIFIED SPEAKER: We received an e-mail on  
7 the 17th requesting information, but it was already  
8 information that had been submitted --

9 THE COURT: I'm afraid you're out of luck then,  
10 because you didn't respond to that e-mail. It's that  
11 simple.

12 UNIDENTIFIED SPEAKER: But, Your Honor, I mean,  
13 that's just simply not fair. I mean, attorneys have other  
14 (indiscernible) --

15 THE COURT: I'm done.

16 UNIDENTIFIED SPEAKER: -- and other things that  
17 they're doing --

18 THE COURT: We're done. It is fair. I ruled this  
19 three times and we're done.

20 UNIDENTIFIED SPEAKER: (Indiscernible). Your  
21 Honor, when a deadline is set, then you, as a lawyer,  
22 understand that you have until that deadline to file  
23 something. (Indiscernible).

24 THE CLERK: Call operator, thank you very much.  
25 We're done for the day.



1 THE OPERATOR: Thank you very much.  
2 (Whereupon these proceedings were concluded at 3:58 PM)  
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C E R T I F I C A T I O N

We, Tracey Williams, Pamela Skaw, and Sherri L. Breach,  
Nicole Yawn, and Jamie Gallagher certify that the foregoing  
transcript is a true and accurate record of the proceedings.

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Exhibit E

**Proceeds of Debtors' Closed Claims**

<b>Store</b>	<b>Recovery</b>	<b>Date of Loss</b>
1111 Colorado Springs	\$28,301.03	8/3/2018
3527 Philadelphia	\$13,500.00	11/16/2018
1884 King of Prussia	\$34,364.08	10/1/2010
2195 Titusville	\$384,391.00	9/1/2017
7622 Franklin	\$3,250.51	2/14/2015
45575 Stockton	\$50,000.00	7/24/2019
6735 Orange Park	\$793.68	1/8/2016
6735 Orange Park	\$2,568.84	11/4/2018
6347 Florida	\$369.58	12/15/2015
7134 Cortland	\$96,480.22	8/8/2013
2911 Bayamon	\$717.29	2/8/2018
3424 Gainesville	\$2,392.50	12/7/2018
4026 St. Joseph	\$40,790.00	1/11/2018
1300 Oak Brook	\$18,750.00	1/21/2019
<b>TOTAL</b>	<b>\$676,668.73</b>	